Supreme Court, U. S.
FILED
MAR 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-252

LARRY MEACHUM, *et al.*,

Petitioners,

v.

ARTHUR FANO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

RICHARD SHAPIRO
Prisoners' Rights Project
294 Washington Street
Room 638
Boston, Massachusetts 02108

ANNE HOFFMAN
Prisoners' Rights Project
294 Washington Street
Room 638
Boston, Massachusetts 02108
(617) 482-2773

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 10

ARGUMENT

I. THE DUE PROCESS CLAUSE APPLIES TO INTRASTATE TRANSFERS OF PRISONERS WHICH RESULT IN A SIGNIFICANT ADVERSE CHANGE IN THE INMATES' OVERALL CONDITIONS OF CONFINEMENT ON THE BASIS OF ALLEGATIONS OF MISCONDUCT 16

A. A Prisoner Whose Conditions of Confinement Are Adversely Changed as a Result of an Intrastate Transfer on the Basis of Misconduct Has Liberty and Property Interests Within the Contemplation of the Fourteenth Amendment 17

1. The Respondents Were Deprived of Liberty Protected by the Fourteenth Amendment as a Result of Their Transfer to More Adverse Conditions of Confinement on the Basis of Misconduct 19

a. Liberty Interest in Conditions of Confinement 20

b. Liberty Interest in Institutional Reputation 26

2. The Respondents Possess a Legitimate Claim of Entitlement to the Rights and Benefits Attached to Confinement at MCI, Norfolk Since Massachusetts Has Organized Its Prisons to Provide Graduated Conditions of Confinement on the Basis of Conduct 33

Page

B. The Preservation of the Minimal Due Process Protections Guaranteed by *Wolff v. McDonnell* Necessitates the Application of the Due Process Clause to Petitioners' Decisions to Transfer Respondents 40

II. THE TRANSFER HEARINGS FAILED TO MEET MINIMAL DUE PROCESS REQUIREMENTS BECAUSE THE NOTICE OF THE HEARINGS AND THE HEARINGS WERE INSUFFICIENT TO PROVIDE THE PRISONERS WITH A MEANINGFUL OPPORTUNITY TO RESPOND TO THE ALLEGATIONS OF MISCONDUCT 49

A. A Careful Balancing of the Countervailing Interests Demonstrates That the Respondents Were Entitled to the Minimal Procedural Requirements Extended to Prisoners in *Wolff v. McDonnell* 50

1. Security Needs, Avoidance of "Tensions" and Rehabilitation 52

2. The "Emergency" Justification 54

3. The Asserted Need to Make Discretionary Decisions 55

4. The Asserted Unsuitability of the Issues for Resolution 57

B. The Hearings Provided the Prisoners Did Not Comply With the Minimal Requirements of the Due Process Clause 60

1. Respondents Were Entitled to a Sufficiently Detailed Notice to Allow Them to Prepare Adequately for the Hearings 60

2. The Respondents Were Entitled in the Particular Circumstances of the Present Case to a Summary of the Informant Information to Ensure a Meaningful Opportunity to be Heard Prior to Their Transfers 63

CONCLUSION 67

APPENDIX 1a

TABLE OF AUTHORITIES

Page

Cases:

Aikens v. Lash, 371 F.Supp. 482 (N.D. Ind. 1974) 32

Almanza v. Oliver, 368 F.Supp. 981 (E.D. Va. 1973) 60

Bell v. Burson, 402 U.S. 535 (1971) 18

Board of Regents v. Roth, 408 U.S. 564 (1972) ..... *passim*

Boddie v. Connecticut, 401 U.S. 371 (1971) 54

Braxton v. Carlson, 483 F.2d 933 (3rd Cir. 1973) 52

Bundy v. Cannon, 328 F.Supp. 165 (D.Md. 1971) 11

Burgett v. Texas, 389 U.S. 109 (1967) 28

Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 49

Cardaropoli v. Norton, 523 F.2d 990 (2nd Cir. 1975) 24, 28, 32, 38

Carlo v. Gunter, 520 F.2d 1293 (1st Cir. 1975) 45, 58

Carroll v. Sielaff, 514 F.2d 415 (7th Cir. 1975) 32

Catalono v. United States, 383 F.Supp. 346 (D. Conn. 1974) 24, 28, 40, 53, 58, 60

Clonce v. Richardson, 379 F.Supp. 338 (W.D.Mo. 1974) 21, 33, 45, 47, 53, 58

Clutchette v. Procunier, 497 F.2d 809 (9th Cir. 1974), opinion on rehearing, 510 F.2d 613 cert. granted sub nom *Enomoto v. Clutchette*, 33 U.S.L.W. 3641 (1975) 21

Coffin v. Reichard, 143 F.2d 443 (6th Cir. 1944), cert. den. 325 U.S. 887 (1945) 16

Daigle v. Hall, 387 F.Supp. 652 (D. Mass. 1975) 7, 36, 45

Duncan v. Madigan, 278 F.2d 695 (9th Cir. 1960), cert. denied, 366 U.S. 919 (1961) 11

Fajeriak v. McGinnis, 493 F.2d 468 (9th Cir. 1974) 11

Ferrell v. Huffman, 350 F.Supp. 164 (E.D. Va. 1972) 57

	Page
Gagnon v. Scarpelli, 411 U.S. 778 (1973)	19, 51, 57
In re Gault, 387 U.S. 1 (1967)	25
Goldberg v. Kelly, 397 U.S. 254 (1970)	38, 47, 48, 60
Gomes v. Travisono, 353 F.Supp. 457 (D. R.I. 1972)	30
Gomes v. Travisono, 490 F.2d 1209 (1st Cir. 1973) vacated and remanded sub nom *Travisono v. Gomes*, 418 U.S. 909 on reconsideration after remand, 510 F.2d 537 (1st Cir. 1974)	*passim*
Gonzalez v. United States, 348 U.S. 407 (1955)	66
Goss v. Lopez, 419 U.S. 565 (1975)	*passim*
Graham v. Richardson, 403 U.S. 365 (1971)	11, 18, 47
Gray v. Creamer, 465 F.2d (3rd Cir. 1972)	11
Greene v. McElroy, 360 U.S. 474 (1959)	62
Haines v. Kerner, 404 U.S. 519 (1972)	19
Hanvey v. Pinto, 441 F.2d 1155 (3rd Cir. 1971)	11
Hillen v. Director of Social Service and Housing, 455 F.2d 510 (9th Cir. 1972)	11
Hoitt v. Vitek, 361 F. Supp. 1238 (D. N.H. 1973) aff'd 497 F.2d 598 (1st Cir. 1974)	55
Hudson v. Hardy, 424 F.2d 854 (D.C. Cir. 1970)	28
Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951)	15, 23, 45, 51, 62
Kessler v. Cupp, 372 F.Supp. 76 (D. Ore. 1973)	47
LaBatt v. Twomey, 513 F.2d 641 (7th Cir. 1975)	54
Landman v. Peyton, 370 F.2d 135 (4th Cir.) cert. den. 385 U.S. 881 (1966)	54, 55
Lynch v. Household Finance Corporation, 405 U.S. 538 (1972)	18
Meyer v. Nebraska, 262 U.S. 390 (1923)	19
Morgan v. United States, 304 U.S. 1 (1938)	60, 62
Morris v. Travisono, 310 F.Supp. 857 (D. R.I. 1970)	41

	Page
Morrissey v. Brewer, 408 U.S. 471 (1972)	*passim*
Newkirk v. Butler, 364 F.Supp. 497 (S.D.N.Y. 1973), aff'd 497 F.2d 1214 (2nd Cir. 1974) vac. with instructions to dismiss as moot 422 U.S. 395 (1975)	32
Palmigiano v. Baxter, 487 F.2d 1280 (1st Cir. 1973) vac. and remanded, 418 U.S. 908 (1974) aff'd in part and rev'd in part, 510 F.2d 534 (1st Cir. 1974) cert. granted 33 U.S.L.W. (1975)	22, 41, 54, 65
Pell v. Procunier, 417 U.S. 817 (1974)	10
Perry v. Sindermann, 408 U.S. 593 (1972)	34, 37
Peyton v. Rowe, 391 U.S. 54 (1968)	29
Poe v. Ullman, 367 U.S. 497 (1961)	19
Preiser v. Rodriguez, 411 U.S. 475 (1973)	27
Procunier v. Martinez, 416 U.S. 396 (1974)	19, 21, 31, 48
Richardson v. Perales, 402 U.S. 389 (1971)	51
Robbins v. Kleindienst, 383 F.Supp. 239 (D.D.C. 1974)	*passim*
Rosenberg v. Preiser, 388 F.Supp. 639 (S.D.N.Y. 1975)	47, 59
Ruffin v. Commonwealth, 62 Va. (21 Grath) 790 (1871)	31
Sands v. Wainwright, 491 F.2d 417 (5th Cir. 1974), certiorari denied *sub nom*, Guajardo v. Estelle, 416 U.S. 992 (1974)	10
Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971)	62
Stone v. Egeler, 377 F.Supp. 115 (W.D. Mich. 1973), aff'd. 506 F.2d 287 (6th Cir. 1974)	25, 32
United States ex rel. Haymes v. Montanye, 505 F.2d 977 (2d Cir. 1974), cert. granted 422 U.S. 1055 (1975)	25, 29, 32, 45
United States ex rel. Miller v. Twomey, 479 F.2d 701 (7th Cir. 1973)	16, 22
Walker v. Hughes, 386 F.Supp. 32, vacating 375 F.Supp. 708 (E.D. Mich. 1974)	32

	Page
White v. Gillman, 360 F.Supp. 64 (S.D. Iowa 1973)	32
Wieman v. Updegraff, 344 U.S. 183 (1952)	30
Wilwording v. Swenson, 404 U.S. 249 (1971)	19
In re Winship, 397 U.S. 358 (1970)	51
Wisconsin v. Constantineau, 400 U.S. 433 (1971)	26, 29
Wolff v. McDonnell, 418 U.S. 539 (1974)	*passim*
Constitution, Statutes and Rules:	
United States Constitution Fourteenth Amendment	*passim*
42 U.S.C. 1983	6
Federal Rules of Civil Procedure 52(a)	23
Federal Rules of Civil Procedure 60(b)	8
M.G.L.A. Ch. 124, sec. 1(e)	24, 34
M.G.L.A. Ch. 124, sec. 1(f)	34
M.G.L.A. Ch. 127, sec. 32	36
M.G.L.A. Ch. 127, sec. 40	50
M.G.L.A. Ch. 127, sec. 48	34, 35
M.G.L.A. Ch. 127, sec. 49	35
M.G.L.A. Ch. 127, sec. 49A	35
M.G.L.A. Ch. 127, sec. 97	6, 11
M.G.L.A. Ch. 127, sec. 129D	39
Miscellaneous:	
American Correctional Association, Manual of Correctional Standards (1972)	43
Attica: The Official Report of the New York State Special Commission on Attica (Bantam ed. 1972)	30
Bergeson and Hoerger, Judicial Misconceptions and the Hidden Agenda on Prisoners' Rights Litigation, 14 Santa Clara L. Rev. 747 (1974)	27
Bourde, The Use of Involuntary Inter-Prison Transfer as a Sanction, 3 Am. Journal of Criminal Law 117 (1974)	27, 33, 42, 43, 47

	Page
Carlson, The Federal Prison System: Forty-Five Years of Change, 39 Federal Probation 37 (June, 1975)	36
Cohen, The Discovery of Prison Reform, 21 Buffalo Law Review 855 (1972)	26
Fogel, We Are the Living Proof: The Justice Model of Corrections (1975)	54
Foote, "The Sentencing Function," reported in Annual Chief Justice Earl Warren Conference on Advocacy in the United States (1972)	27
Fox, Why Prisoners Riot, 35 Federal Probation (1971)	54
Friendly, Some Kind of Hearing, 123 U. Penn. L. Rev. 1267 (1975)	60, 66
Gifis, Nature of Decisionmaking in a Prison Community, 1974 Wisconsin Law Review 349	27
Glaser, The Effectiveness of a Prison and Parole System (Abridged edition, 1969)	27, 53
E. Goffman, Asylums (Anchor ed. 1961)	20, 27
Hearings Before Subcommittee No. 3 on Corrections of the Committee on the Judiciary of the House of Representatives, 92 Congress (First Session) Part V: Prisons, Prison Reform and Prisoners' Rights, Massachusetts (December 18, 1971)	35-36
Hearings on Behavior Modification Programs: Federal Bureau of Prisons, Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary (93rd Congress, 2d Session) (February 27, 1974)	45
Individual Rights and the Federal Role in Behavior Modification, Committee on the Judiciary, United States Senate (93rd Congress, 2d Session) (November, 1974)	45
Kimball and Newman, Judicial Intervention in Correctional Decisions: Threat and Response 14 Crime and Delinquency 1 (1968)	57

Page

McCorkle and Korn, "Resocialization Within Walls," Annals of American Academy of Political and Social Science 293:88 (May, 1954) 64

Millemann and Millemann, The Prisoner's Right to Stay Where He Is: State and Federal Compacts Run Afoul of Constitutional Due Process, 3 Cap. U. L. Rev. 223 (1974) 33

National Advisory Committee on Criminal Justice Standards and Goals, Corrections (1973) 33, 53

Note, Bargaining in Correctional Institutions: Restructuring the Relation Between the Inmate and the Prison Authority, 81 Yale L. J. 726 (1972) 53, 54

Note, Procedural Due Process in the Involuntary Institutional Transfer of Prisoners, 60 Va. L. Rev. 330 (1974) 33

Ohlin, Modification of the Criminal Value Systems in the Sociology of Punishment and Correction (1962) 53

Powelson and Bendix, Psychiatry in Prison, 14 Psychiatry 73 (1951) 45

Powers, The Basic Structure of the Administration of Justice in Massachusetts (6th ed. 1973) 22, 37

President's Commission on Law Enforcement and the Administration of Justice: Corrections (1967) 27-28, 53

Regulations Governing Disciplinary and Classification Procedures at the Adult Correctional Institution, State of Rhode Island 41

Report on New York Parole: A Summary, 11 Criminal Law Bulletin 273 (1975) 27

Sirico, Prisoner Classification and Administrative Decisionmaking, 50 Texas L. Review 1229 (1972) 27, 30, 51

Special Project, The Collateral Consequences of a Criminal Conviction, 23 Vanderbilt Law Review No. 5 (May, 1970) 30

Page

Sykes, The Society of Captives (Princeton University Press, 1972 ed.) 20, 30, 64

Van Alstyne, The Demise of the Right-Privilege Dichotomy in Constitutional Law, 81 Harv. L. Rev. 1439 (1968) 18

Wilmer, The Role of the "Rat" in the Prison, 29 Federal Probation 44 (March, 1965) 64

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-252

LARRY MEACHUM, *et al.*,

Petitioners,

v.

ARTHUR FANO, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS

QUESTIONS PRESENTED

I

Whether a prisoner who suffers a major adverse change in the conditions of his confinement as the result of transfer from a medium to a maximum security prison on the basis of allegations of misconduct is entitled to the protection of the Due Process Clause of the Fourteenth Amendment.

II

Whether the failure of prison officials to provide the prisoner with adequate notice of the charges of misconduct and with a summary of the evidence against him deprived the inmate of a meaningful opportunity to be heard prior to his transfer to more adverse conditions of confinement.

STATEMENT OF THE CASE

During a period of unrest at the Massachusetts Correctional Institution (hereinafter MCI) Norfolk, the respondents were summarily removed from the general population at that institution and were placed in a segregation unit. (App. 55, 56).[1] The respondents did not receive any written notice or hearing prior to being placed in segregation nor were they informed, either orally or in writing, of the reasons for their placement in this unit. (App. 56). On October 25, 1974, each inmate was given a copy of a disciplinary report which charged him in general terms with major violations of certain institutional rules and regulations. (App. 34-38,

[1]The factual record in this case is principally comprised of stipulations entered into by the parties in the United States District Court. Only one witness testified and his testimony has not been preserved for appeal. See *Fano v. Meachum*, (App. 131-138) 387 F.Supp. 664, 666 (D. Mass. 1975).

63).[2] The alleged offenses were also referred to the local district attorney for investigation and possible prosecution.[3] No disciplinary hearing was held on these charges, despite the requests of respondents' counsel (App. 56-57).[4] On November 4, 1974, each inmate was

[2]If the respondents had been provided with disciplinary hearings, the inmates would have been afforded the procedures for major violations required by Commissioner's Bulletin 72-1 (App. 114-115). These regulations, in effect since June 5, 1972, mandate specific procedural rights for inmates in order to provide "a speedy and fair adjudication of alleged wrong-doing." (App. 109). The procedures at such a hearing include written notice of the charges and a copy of the disciplinary report prior to the hearing; the opportunity to be represented by counsel or a law student; the opportunity to have the complaining officer present and to question him; the right to view any report considered by the board; the opportunity to present testimony or documentary evidence on his behalf; the right to confrontation; and the right to a written statement of reasons and findings based on reliable evidence.

According to these disciplinary regulations, once a finding of guilt has been made, the inmate's past record may be considered in deciding the appropriate sanction (App. 115), and transfer of the inmate is a permissible punishment (App. 117).

[3]In late November, petitioner Meachum was informed by the office of the District Attorney that his investigation "has not at this time revealed sufficient evidence against these subjects [including the respondents] to proceed against them criminally." (App. 56-57).

[4]The petitioners have taken the position that they were barred by the disciplinary regulations (App. 118) from holding disciplinary hearings to impose institutional sanctions when a case has been referred to the District Attorney for prosecution. Brief for Petitioners at 5, note 2; [hereinafter Pet. Br.] However, the disciplinary regulations indicate that a hearing may be held although a sanction shall not be imposed. Moreover, the Court of Appeals concluded that respondents' position, even if well-founded, could not "immunize what would otherwise be a due process violation." *Fano v. Meachum*, (App. 145).

served with a Notice of Classification Hearing (App. 58), after a request for a temporary restraining order had been sought in district court. These notices stated that respondents would receive classification hearings "in view of" certain information obtained from informant sources that linked respondents to the planning and execution of fires, possession of contraband and trafficking in drugs. (App. 39, 40, 64-67). This information was described in language that tracked the disciplinary reports. None of these notices apprised the inmate of the time or place of the alleged acts nor did the notices provide any but the most general information relating to the charge.

Classification hearings were subsequently held for each respondent within the next ten days. (App. 58). The Board opened each hearing by reading a prepared statement and then ordered the respondents and their representatives from the room. (App. 58). The Board then listened to the unsworn hearsay testimony of Superintendent Meachum of MCI-Norfolk. His testimony was based on information supplied to him by confidential informants (App. 58-59). After the evidence of the alleged offenses were presented in these closed sessions, the prisoner and his counsel were permitted to reenter the room. Each respondent was then informed that the informant information supplied by Meachum supported the allegations in the notices (App. 59).[5] No other evidence in support of the allegations of misconduct was presented at the hearing.

[5]In at least one case, the Classification Board stated that it had concluded that the information was reliable before affording the inmate any opportunity to be heard. (App. 59).

The inmates were not informed of any of the information, even in summary form, supporting the general allegations. None of the inmates were specifically informed of what they had allegedly planned to do nor were any of the respondents apprised of when or with whom they had engaged in the alleged activities. The inmates charged with possession of contraband were not even told what contraband they had allegedly possessed. Each inmate denied his participation in any of the general activity recited in the disciplinary charges or in the notices of the classification hearings. (App. 68-108).[6]

The Classification Board recommended transfer of all the respondents, with the exception of Royce, to maximum security institutions at Walpole or Bridgewater (App. 59-60). Respondents were not provided with a written statement of the Board's reasons for its decisions or of the evidence on which the Board relied (App. 60). They were only orally informed that the recommendations of the Board were based on the disclosed informant information (App. 60).

[6]Since the inmate could not respond to the charges, he tried to avert transfer by producing general character references or recommendations (App. 72, 74, 102); by guessing at the charges and asserting his lack of involvement (App. 69, 100); or by arguing that he had an excellent institutional record (App. 42-43, 45, 47, 49). However, the prisoners had no way of knowing whether any of this information would be relevant or useful to the Board in reaching its decision, nor could they know whether any of the information presented would even be considered by the Board. In fact, most, if not all, of this information was discounted by the Board. In fact, most, if not all, of this information was discounted by the Board which predicated its decisions solely on the testimony presented by Meachum. (App. 70-71, 75, 81-82, 100).

The Board then prepared a written report of its recommendations for the Commissioner to review. The respondents were not informed of the contents of this report. (App. 60). The recommendations of the Board to transfer five of the respondents to Walpole or Bridgewater were followed[7] (App. 61). Although respondent Royce did not appeal the Board's decision, the recommendation that he remain at Norfolk was reversed by the Commissioner. (App. 53, 61). Respondents were subsequently transferred[8] to Walpole and Bridgewater. Respondents were never provided with a written statement of the reasons for the Commissioner's decisions nor of the evidence the Commissioner relied on in making those decisions. (App. 61).

The respondents' transfers, and the bases thereof, were noted in each inmate's institutional file which is reviewed by the Furlough Board, the Parole Board, and other administrative agencies of the Department of Correction (App. 62) and may affect respondents' opportunities to obtain furloughs, to participate in work release and other correctional programs and, ultimately, to gain release on parole.

Respondents then sought relief, pursuant to 42 U.S.C. sec. 1983, in the United States District Court.

[7]The Commissioner decided to transfer respondent DeBrosky to Walpole rather than Bridgewater.

[8]The Commissioner has been vested with broad statutory authority to transfer inmates. M.G.L.A. Ch. 127, sec. 97 (1974 ed). This statute does not explicate the standards governing a transfer. Pursuant to this statute, the Commissioner has delegated authority to lower prison officials to transfer inmates as a disciplinary sanction for a "major violation" of institutional rules and regulations (App. 117).

The complaint, which was subsequently amended, alleged that the prison officials had violated the Constitution by placing respondents in segregation cells without prior notice and by transferring them to more adverse conditions of confinement in other institutions without adequate notice and hearings (App. 16). Respondents sought declaratory and injunctive relief as well as compensatory and punitive damages.

After reviewing the stipulated record,[9] the District Court found that the conditions of confinement at MCI-Walpole and MCI-Bridgewater, were substantially more adverse than those at MCI-Norfolk and, further, that these institutions had been deliberately differentiated to provide graduated conditions of confinement within the Department of Correction. *Fano v. Meachum* (App. 135).[10] Since the District Court viewed the transfers as disciplinary in nature, the Court concluded that the defendants were required under *Wolff v. McDonnell*, 418 U.S. 539 (1974) to give inmates who were charged against them so that they could prepare a

[9]The Solicitor General alludes to an affidavit of Superintendent Meachum attesting to the Superintendent's view of the reliability and credibility of the informants as well as to his opinion of the danger to them from a more detailed summary of the evidence (App. 140-141), [*Brief For The United States As Amicus Curiae* at 9, note 10 (hereinafter S.G.Br.)] This affidavit was not part of the stipulated record considered by the District Court. The affidavit was submitted to the District Court only for purposes of the petitioners' Motion for Stay Pending Appeal; it was not offered to the District Court for purposes of the record at the District Court hearing nor did Superintendent Meachum ever testify on the matters contained in the affidavit.

[10]The District Court had previously noted its awareness of the conditions in these two institutions. *Daigle v. Hall*, 387 F. Supp. 652, 659 (D. Mass. 1975).

meaningful and intelligent defense (App. 136)[11] and notice of the hearing that, at the very least, provided the inmates with the time and place of the alleged offense. (App. 137). Since the petitioners had failed to follow constitutionally adequate procedures, the District Court ordered the prisoners returned to the general population at MCI-Norfolk.[12] The petitioners then

[11]The District Court noted that Institutional Order 4310.1 (App. 136) which was in effect at MCI Walpole, provided guidance as to the minimum requirements in the peculiar circumstances of the present case. This order provides, in pertinent part, the following:

> "The board may issue any orders it deems necessary to conducting a thorough and adequate investigation, including the calling of witnesses and production of evidence. No testimony may be taken outside the accused resident's presence unless he voluntarily absents himself, or the board chairman determines that disclosure would involve:
> (1) Subjecting the informant to a significant risk or harm or
> (2) A substantial risk to institutional security
> (3) On making a finding that a threat exists and that there is need for protection of sources, the board chairman will note such a finding in the hearing record.
> (4) He will also summarize the information in question for the accused resident and state generally the board's reasons for such protective action."

Petitioners assert that the action of the District Judge in taking judicial notice of this regulation was improper under the Federal Rules of Evidence. [Pet.Br. at 3, note 1] The short answer to this contention is that the Federal Rules of Evidence did not go into effect until July 1, 1975, after the District Court's decision was issued. Moreover, if petitioners felt aggrieved by this action, they should have sought relief in the District Court after the issuance of the order, pursuant to Federal Rules of Civil Procedure 60(b), rather than raising this evidentiary point in this Court for the first time.

[12]The District Court also directed the Commissioner of Correction and the Superintendent of Norfolk to submit regulations providing inmates at Norfolk with rights to transfer hearings substantially in accordance with a prior decision of the Court and with the regulations mentioned in note 11 *supra*. *Fano v. Meachum*, (App. 138).

appealed to the United States Court of Appeals for the First Circuit.[13]

The Court of Appeals, in affirming the judgment of the District Court, viewed the case in a slightly different light than the lower court. The Court focused on two issues: (1) whether the Due Process Clause applies to the decision to transfer an inmate from medium to maximum security institutions within Massachusetts, *Fano v. Meachum*, (App. 146-147), and (2) if due process guarantees are applicable, what specific procedures were appropriate in the circumstances of the present case. (App. 150). With respect to the first issue, the Court did not attach any significance, as did the District Court, to the fact that the proceedings were for "classification" rather than "discipline." (App. 145, note 2). Instead, after a careful review of the substantial deprivations flowing from the prisoners' transfers, the Court concluded that "the inmate interests affected fall within the liberty protected by the Fourteenth Amendment." (App. 150).

Once having decided that the Due Process Clause was applicable, the Court of Appeals considered what procedures were appropriate under the circumstances. The Court determined that, in the instant case, this inquiry was restricted by two factors: (1) the inmates' objections to the hearing were limited to the lack of any summary of the evidence provided by confidential informants (App. 150);[14] and (2) the Walpole regula-

[13]After the District Court denied petitioners' Motion for a Stay Pending Appeal, a stay was granted by the United States Court of Appeals on January 23, 1975 (App. 142-143). The appeal to that Court was also expedited. The order of the District Court directing that the respondents be transferred back to MCI-Norfolk has been stayed since that date.

[14]The respondents had vigorously objected in their complaint and before the District Court to the inadequate notice as well. (App. 29). See also *Fano v. Meachum* (App. 134).

tion, cited by the District Court, reflected "that the release of a summary of informant provided information is not inconsistent with institutional requirements," and that, absent some suggestion that the rule was unworkable or unduly burdensome, prison officials could not deny similar procedures to inmates at a medium security institution. (App. 152).[15]

This Court subsequently granted the petition for a writ of certiorari on December 8, 1975.[16]

SUMMARY OF ARGUMENT

This case involves the extent to which an inmate is entitled to the protection of the Due Process Clause when he is transferred intrastate from a medium security institution to a maximum security institution on the basis of allegations of misconduct. The

[15]Finally, the Court affirmed the holding of the District Court that the notice of the hearing must "at the very least state the time and place of the alleged offense with reasonable accuracy." *Id.* at 380 (App. 152). The Court concluded that this requirement was not only mandated by *Wolff* but also that the notice would not provide the inmate with any information beyond the summary already required by the Court of Appeals decision (App. 152).

[16]The Solicitor General suggests that "[t]here is a substantial question whether this case is properly before the Court" since "[c]onstitutional challenges seeking injunctions against the state regulations of statewide applicability must be heard by district courts of three judges." S.G.Br. at 7, note 9. It is difficult to understand the basis of the *amicus'* contention since the prayer for relief in the Amended Verified Complaint (App. 31-32) did not request injunctive relief against the enforcement of *any* regulation, let alone a regulation of state-wide applicability. Furthermore, the District Court did not, *sua sponte*, enjoin any regulations (App. 137-138). Cf. *Pell v. Procunier*, 417 U.S. 817, at note 1 (1974); *Sands v. Wainwright*, 491 F.2d 417, (5th Cir., 1974), certiorari denied *sub nom Guajardo v. Estelle*, 416 U.S. 992 (1974).

respondents do not challenge the authority of prison officials to transfer prisoners.[17] Nor do the respondents assert that they have any constitutional right to remain at a particular prison throughout the term of their imprisonment.[18] However, respondents do contend that substantial liberty and property interests are implicated in intrastate transfers which involve an adverse change of the overall conditions of confinement and that the Due Process Clause is applicable to such transfers.

[17]This authority has been considered a matter appropriate for Congressional or state legislative authorization. See e.g., *Hillen v. Director of Social Service and Housing*, 455 F.2d 510 (9th Cir. 1972); *Hanvey v. Pinto*, 441 F.2d 1155 (3rd Cir. 1971); *Duncan v. Madigan*, 278 F.2d 695 (9th Cir. 1960) cert. denied, 366 U.S. 919 (1961). See also, *Gomes v. Travisono*, 490 F.2d 1209, 1212 at note 2 (1st Cir. 1973) vacated and remanded *sub nom, Travisono v. Gomes*, 418 U.S. 909 (1974), on reconsideration after remand, 510 F.2d 537 (1st Cir. 1974).

For the most part, the above cases were considered on *pro se* petitions without any extensive presentation, development or analysis of the issues involved. See also, *Fajeriak v. McGinnis*, 493 F.2d 468 (9th Cir. 1974).

In Massachusetts, transfer authority has been vested by statute in the Commissioner of Correction. See M.G.L.A. Ch. 127, sec. 97 (1974 ed).

[18]For cases rejecting this argument, see e.g., *Gray v. Creamer*, 465 F.2d 179, 187 (3rd Cir. 1972); *Bundy v. Cannon*, 328 F.Supp. 165, 173 (D. Md. 1971). See also, *Gomes v. Travisono*, *supra*, 490 F.2d at 1212, note 3. However, as the Court of Appeals noted in *Gomes*, *id*, the force of these opinions has been vitiated by this Court's rejection of the principle "that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege'." *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Nonetheless, the right-privilege distinction continues to cloud analysis of prisoners' cases. See the dissenting opinion of Judge Campbell in *Fano v. Meachum* (App. 153).

I

Due process is a flexible concept which affords protection to all individuals from arbitrary deprivations of their liberty or property. Respondents, although prisoners, still have "limited liberty" protected by the Due Process Clause. The petitioners stipulated to a factual record which supported the finding of the District Court that the conditions at the maximum security prisons to which respondents were transferred were substantially more adverse than those at the medium security prison at Norfolk (App. 135). Furthermore, a notation was placed in each of the respondents' files which indicated that he had been transferred as the result of serious misconduct, including the planning and execution of fires, the possession of contraband such as weapons and the trafficking in drugs. This notation, which identifies respondents as "troublemakers" will have serious future consequences, for this information will be considered by correctional officials and the parole board in reaching critical decisions affecting the length and nature of respondents' incarceration. On the basis of a record of serious deprivations affecting all aspects of the respondents' confinement, the Court of Appeals properly recognized that the "inmate interests . . . fall within the liberty protected by the Fourteenth Amendment" (App. 150).

II

Respondents also have a legitimate claim of entitlement to the rights and benefits of incarceration at the medium security prison at Norfolk. Prison officials in

Massachusetts have created a corrections system containing institutions with divergent conditions of confinement in order to effectuate the explicit statutory goals of corrections in the state: rehabilitation and the reintegration of the offender into the community. The right to remain at a particular institution and to partake of the particular rehabilitative programs at that prison is dependent upon the inmate's conduct. Absent misbehavior, he will not be transferred to more restrictive conditions. The record in this case demonstrates that respondents' opportunity to participate in the programs at Norfolk was terminated on the basis of allegations of involvement in serious breaches of prison rules. Since Massachusetts has established a corrections system in which respondents could participate in various rehabilitative programs and since the transfer of respondents to a prison with fewer benefits and opportunities was the result of allegations of misconduct, the petitioners were required to recognize the respondents' legitimate claim of entitlement as a property interest protected by the Due Process Clause.

III

Wolff v. McDonnell, 418 U.S. 539 (1974) strikes a careful balance between the individual rights of prisoners and legitimate institutional goals in requiring prison officials to provide minimal guarantees of due process to inmates charged with serious misconduct. Petitioners initiated the disciplinary process in the present case and charged the respondents with major acts of misconduct. Hearings on these charges would have required the minimal *Wolff* procedural protections: notice, a hearing and a written statement. The

disciplinary process was abruptly discontinued, however, and respondents received classification notices which tracked the disciplinary charges. Respondents were, therefore, entitled to minimal due process at these transfer hearings, for these proceedings were no different from the ordinary disciplinary hearing where allegations of major misconduct are at issue and transfer may be imposed as a sanction (App. 117). To permit the petitioners to circumvent the procedural requirements of *Wolff* by labelling a proceeding a "transfer" hearing rather than a "disciplinary" hearing, when the two processes involve identical inquiries into allegations of serious misconduct, would invite wholesale repudiation of the *Wolff* strictures.

IV

Since the prisoners were deprived of liberty and property protected by the Fourteenth Amendment, they were entitled to hearings which met the minimal requirements of due process. In determining what specific processes are due, the Court must accommodate the legitimate correctional goals of prison officials and the substantial deprivations suffered by the respondents. The various justifications asserted by the prison officials can be given short shrift because they either have been accommodated in *Wolff* or lack any evidentiary support in the record of the proceedings below. Moreover, contrary to petitioners' and *amicus'* assertions, a hearing in the present circumstances would substantially further rehabilitative goals while not impeding any legitimate needs of correctional authorities. Therefore, petitioners have failed to offer any significant justifications for failing to provide respondents with the minimal requisites of *Wolff*

V

The notice provided the prisoners did not comply with the minimal demands of the Due Process Clause. *Wolff v. McDonnell*, 418 U.S. 534, 564 (1974). The notice was insufficient to inform the prisoners of the charges against them and to allow them to marshal the facts in their defense. *Id.* Absent proper notice, the hearings were meaningless, for the evidence of allegations of respondents' misconduct was presented outside the prisoners' presence, and the respondents were unable to present any defense to the charges. Thus, the procedures at respondents' hearings were ritualistic trappings for a "secret one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951). (Frankfurter, J., concurring.)

VI

Finally, the failure of the petitioners to provide respondents with a summary of the information was fundamentally unfair in the circumstances of this case. Since due process requires that prisoners be provided with a statement of the evidence relied on, the prison officials bear a heavy burden in limiting this fundamental right. Petitioners have not presented any reasons in the record for more restrictive procedures in the present circumstances, and, further, their own regulations demonstrate that providing a summary of informant information at the hearing is not inconsistent with legitimate institutional concerns. Petitioners cannot arbitrarily avoid minimal due process requirements without demonstrating any basis in the record for their actions.

ARGUMENT

I.

THE DUE PROCESS CLAUSE APPLIES TO INTRASTATE TRANSFERS OF PRISONERS WHICH RESULT IN A SIGNIFICANT ADVERSE CHANGE IN THE INMATES' OVERALL CONDITIONS OF CONFINEMENT ON THE BASIS OF ALLEGATIONS OF MISCONDUCT.

Petitioners and the Solicitor General assert that the issue of where a prisoner is located is a matter of discretion for prison officials raising no constitutional issues. This contention has a familiar ring, for prison authorities have often argued that their actions should be immune from judicial scrutiny and that prisoners are not entitled to constitutional protections. However, this Court has rejected these assertions as "untenable" and has recognized that "[t]ere is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974).[19] Among the constitutional rights afforded inmates is the protection of the Due Process Clause. *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974).

[19]The Court in *Wolff v. McDonnell*, *supra* at 555, also noted that a prisoner "is not wholly stripped of constitutional protections when he is imprisoned for crime." See also, *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712 (7th Cir. 1973); *Coffin v. Reichard*, 143 F.2d 443, 445 (6th Cir. 1944) cert. den. 325 U.S. 887 (1945).

A. A Prisoner Whose Conditions Of Confinement Are Adversely Changed As The Result of An Intrastate Transfer On The Basis Of Misconduct Has Liberty And Property Interests Within The Contemplation Of The Fourteenth Amendment.

The Fourteenth Amendment forbids the state from depriving any person of life, liberty or property without due process of law. The threshold inquiry for determining whether a hearing is constitutionally mandated in the instant case is to consider whether "the interest [asserted by the prisoner] is one within the contemplation of the 'liberty' or 'property' language of the Fourteenth Amendment." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). This inquiry does not stop at the prison gate. *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974). Petitioners seek to limit this inquiry solely to a determination of whether Massachusetts has created a state interest or claim of entitlement "to remain in a particular institution."[20] However, this analysis drains the Due Process Clause of much of its content and obscures the important distinctions between the "liberty" and "property" protected by the

[20]Brief of the Petitioners at 17-18 [hereinafter Pet.Br.]; Brief of the United States As Amicus Curiae at 21-25 [hereinafter S.G.Br.].

Fourteenth Amendment.[21] Consequently, it is necessary to consider these separate interests[22] in order to fully

[21]Petitioners' and *amicus'* argument reflects a misunderstanding of the distinctions between liberty and property and of prior decisions of this Court. Liberty interests are not creatures of state law, like property interests. *Board of Regents v. Roth*, 408 U.S. 507, 564, 578 (1972). However, a person's liberty is still protected by the Due Process Clause "*even when* the liberty itself is a statutory creation of the State." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). (emphasis supplied). The above language in *Wolff* has been interpreted to mean that the prisoner's liberty interest in the instant case must flow from a "statutory right . . . to be at one institution rather than another." *Fano v. Meachum*, (App. 153) (Campbell, J., dissenting). This analytical error results from a misreading of *Wolff*. The guidance that a Court obtains from state law for the consideration of property rights is, for the most part, irrelevant to interests of liberty which are not conditioned upon state-created rights. *Wolff* only recognized that, regardless of the source of liberty, the individual's liberty interest is still protected by the Due Process Clause. The interests identified in *Wolff*, therefore, could have been accurately described as either liberty or property interests. Thus, the analysis of liberty and property interests paralleled each other in that particular case. That does not mean that a similar analysis is appropriate in every other prison case where liberty and property interests are implicated. Instead, there is a separate and identifiable constellation of rights and opportunities constituting the interest of liberty which do not hang on the slender reed of state-created rights. By not recognizing this distinction, petitioners' argument has the anachronistic tone of the "right-privilege" distinction, and resurrects conclusory terms, rather than analysis, to define the parameters of constitutional rights. See e.g., *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972); *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Bell v. Burson*, 402 U.S. 535, 539 (1971). See also, Van Alstyne, *The Demise of the Right-Privilege Dichotomy in Constitutional Law*, 81 Harv. L. Rev. 1439 (1968).

[22]Regardless of the precise line of demarcation between liberty and property, *Lynch v. Household Finance Corporation*, 405 U.S. 538, 552 (1972), it is clear that these two interests have a different content. Cf. *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (discussion of property interest) with *Goss v. Lopez*, *id.* at 574-575 (discussion of liberty interest). See also, *Board of Regents v. Roth*, 408 U.S. 564, 571-578 (1972).

understand how they are both implicated in a decision which results in the transfer of an individual from a medium to a maximum security institution.

1. The Respondents Were Deprived of Liberty Protected By The Fourteenth Amendment As a Result of Their Transfer to More Adverse Conditions of Confinement On The Basis of Misconduct.

The Due Process Clause forbids arbitrary deprivations of liberty. *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). The analysis of liberty interests by this Court has reflected a realistic appreciation that constitutional principles are not static or inflexible. Consequently, the Court has recognized that a continuum of liberty interests is protected by the Due Process Clause. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972).[23] The liberty of free men[24] may be distinguishable from the "conditional liberty" of parolees[25] or probationers.[26] Prisoners also possess limited liberty interests. *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Procunier v. Martinez*, 416 U.S. 396, 418 (1974); *Haines v. Kerner*, 404 U.S. 519 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971). Finally, at the outer reaches of this continuum, there may be interests which are so insubstantial or

[23]As Justice Harlan once noted:

> "(Liberty) is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints." *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

[24]See e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). This liberty is, of course, not absolute but may be subject to reasonable restrictions.

[25]*Morrissey v. Brewer*, 408 U.S. 471 (1972).

[26]*Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

insignificant that their deprivation will be tolerated, no matter how arbitrarily state officials choose to act. *Goss v. Lopez*, 419 U.S. 565, 576 (1975); *Board of Regents v. Roth*, 408 U.S. 564, 573-575 (1972); *Wolff v. McDonnell*, *supra*, 418 U.S. at 571-572 at note 19 (1974).[27]

a. Liberty Interest in Conditions of Confinement

The deprivation of liberty after adjudication of guilt and incarceration is partial, not total. *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974). Because liberty is so limited in "total institutions",[28] the Court has been particularly sensitive to the additional restrictions upon a prisoner which are imposed by the state. Therefore, the Due Process Clause requires prison

[27]In contrast to this flexible approach to liberty, the petitioners and the Solicitor General would have this Court resurrect a static notion of liberty interests which depends solely on whether one is in or out of prison. However, this position ignores the decisions in *Morrissey* and *Wolff*, which indicate that "liberty" and "custody" cannot be equated.

Petitioners' analysis of due process also depends ultimately on a consideration of the status of the individual rather than upon an evaluation of the nature of his interest. However, status is irrelevant to whether there is a liberty interest, although it may be a factor in determining what process is due. Cf. *Wolff v. McDonnell*, *supra*, 418 U.S. at 555-556. Moreover, status is usually associated with determining whether there is a property interest, for a person's status may condition the reasonableness of his expectations in property. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

[28]See generally, E. Goffman, *Asylums* 13-15 (Anchor ed. 1961).

See also, G. Sykes, *The Society of Captives* (Princeton University Press, 1972 ed.).

officials to afford minimal procedural protections to a prisoner prior to deprivation of good time or a major adverse change in the conditions of confinement as a result of misconduct. *Wolff v. McDonnell*, 418 U.S. 539, 571-572 at note 19 (1974); *id* at 581, note 1 (Marshall, J., dissenting in part); *id* at 594-595 (Douglas, J., dissenting in part).[29] Also, the Court has recognized that a prisoner's liberty includes the right to uncensored correspondence, which, absent a hearing, cannot be impeded. *Procunier v. Martinez*, 416 U.S. 396, 418 (1974). Similarly, an increase in restraints upon movement, a more restrictive custody level, additional controls or security, fewer educational or rehabilitative programs or interference with other activities can sharply affect the inmate's liberty within the "closed, tightly controlled" prison environment. *Wolff v. McDonnell*, 418 U.S. 539, 561 (1974).[30]

[29]All nine Justices agreed in *Wolff* that a prisoner's liberty interest was implicated by a major adverse change in the conditions of confinement on the basis of misconduct. Lower federal courts have reached the same conclusion about the *Wolff* decision. See e.g., *Clonce v. Richardson*, 379 F. Supp. 338, 349 at note 2 (W.D. Mo. 1974).

[30]Lower federal courts have similarly recognized that the extent to which a decision of prison officials implicates the liberty interest of a prisoner turns on the particular environment of a "total institution."

As the Court of Appeals for the Ninth Circuit noted:

> Any deprivation of the small store of "privileges" accorded a confined or relatively confined group causes a far greater sense of loss than a similar deprivation in a free setting, as anyone can attest who has been a student in a strict boarding school, a sailor aboard ship, a combat soldier, or a prisoner in time of war or peace . . . Grievousness of the loss depends upon the nature and circumstances and makeup of the prisoner who suffers the loss. *Clutchette v. Procunier*, 497 F. 2d 809 (9th Cir. 1974) (Opinion on rehearing, 510 F. 2d 613, 615 (9th Cir. 1974).

(continued)

The record in this case demonstrates that the transfers of respondents had a substantial adverse effect on their limited liberty. The District Court took judicial notice of the fact that the conditions of confinement at Norfolk had been deliberately differentiated from those at Walpole and Bridgewater (App. 135). MCI, Walpole and MCI, Bridgewater are both maximum security institutions where the inmate is subject to stricter security measures and controls upon his daily life than at the medium security prison, MCI, Norfolk (App. 61-62).[31] There is also fewer rehabilitative opportunities available at these institutions than at MCI, Norfolk. For example, MCI, Norfolk offers inmates training in a wide variety of vocations, provides educational opportunities

(footnote continued from preceding page)

Similarly, the Court of Appeals for the First Circuit has stated:

> In a prison setting where liberty is by necessity shrunken to a small set of minor amenities, such as work or schooling privileges, visitations, and some modicum of privacy, it is likely that any marked change of status which forecloses such liberties will be perceived and felt as a grievous loss. *Palmigiano v. Baxter*, 487 F. 2d 1280, 1284 (1st Cir. 1973).

See also, *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 717 (7th Cir. 1973).

Petitioners and the Solicitor General also argue that this inquiry should be limited to a consideration of whether the prisoner has a legitimate claim of entitlement to incarceration in a particular prison. This argument suffers from the same defects noted above, *supra*, note 21. The prisoner does not have to invoke an independent source for his liberty interest.

[31] E. Powers, *The Basic Structure of the Administration of Justice in Massachusetts* 210-214 (6th ed. 1973). This book has been filed in the Office of the Clerk.

through classroom instruction and, of most importance, inmates at Norfolk may participate in work-release programs which facilitate their reintegration into the community (App. 62).[32] These opportunities are curtailed at Walpole and Bridgewater (App. 62). Finally, furloughs, which are essential in enabling the prisoner to maintain community ties, are more difficult to obtain at Walpole than at Norfolk (App. 62).

Furthermore, the deprivations imposed upon respondents as a consequence of their transfers constituted a "grievous loss." See *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974). The Court of Appeals recognized that the deprivations to respondents were "serious" and "certain" (App. 148) and accorded the proper deference of a reviewing court to the factual findings of the district judge.[33] The stipulated record was replete with specific instances of the abrupt, adverse changes in the conditions of respondents' confinement resulting from these transfers; including the "disadvantages from the breaking off of established programs, both educational and rehabilitative, and [the] orientation to a new setting, programs, rules and companions." *Gomes v. Travisono*, 409 F.2d at 1213 (App. 149). In the present case, all of the respondents suffered these serious deprivations. Hathaway was divested of his laundry

[32] *Id.* at 213.

[33] See Federal Rules of Civil Procedure 52(a) (1975 ed.). The District Court had entered a specific finding of fact "that the conditions of confinement at MCI, Walpole and MCI, Bridgewater are substantially more adverse than they are at MCI, Norfolk" (App. 135).

business, a source of livelihood within the prison, and lost his opportunity to participate in group therapy (App. 98-100); Dussault lost his job as a plumber and his avocation (App. 68-70); DeBrosky's involvement with a paint crew and his active participation in an educational program were terminated (App. 94); and Royce's supportive counselling relationships with the staff at Norfolk were disrupted (App. 104).[34] Since rehabilitation is the principal purpose of confinement in Massachusetts, M.G.L.A. Ch. 124, sec. 1(e) (1974 ed.),[35] disruption or interference with these activities must be viewed as a substantial barrier to the prisoner's ability to improve himself and partake of additional opportunities. Cf. *Cardaropoli v. Norton*, 523 F.2d 990, 995 at note 11 (2d Cir. 1975); *Catalano v. United States*, 383 F.Supp. 346, 350-351 (D.Conn. 1974).

[34]Petitioners and the Solicitor General repeatedly suggest that the Court of Appeals erroneously viewed the weight of the respondents' interest rather than the nature of it. However, the petitioners and *amicus* ignore the analytical underpinnings of the Court of Appeals decision. The interests asserted by the inmates in this case were readily identifiable as implicating their liberty; the only issue was whether the deprivations were substantial enough to be protected by the Fourteenth Amendment. The careful analysis by the Court of Appeals of the significance of the deprivations to the respondents is consistent with the approach in this Court's prior decisions. See e.g., *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (prisoner's interest must have real substance). See also, *Goss v. Lopez*, 419 U.S. 565, 576 (1975).

[35]It is clear that the *nature* of respondents' interest affected as a result of these deprivations is not dependent on whether these losses are considered rights or privileges. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). See also, note 21, *supra*.

Therefore, the transfer of respondents on the basis of allegations of misconduct from the relaxed, rehabilitative atmosphere of Norfolk to the rigid, restrictive environments of maximum security institutions had a traumatic affect on the prisoners' lives[36] and on the residuum of their protected liberties.[37]

[36]Although the Court of Appeals considered geography irrelevant in the present case (App. 147-148), many intrastate transfers have serious geographical consequences. See *United States ex rel. Haymes v. Montanye*, 505 F.2d 977 (2d Cir. 1974) cert. granted 422 U.S. 1055 (1975) (several hundred miles); *Stone v. Egeler*, 377 F.Supp. 155 (W.D. Mich. 1973) aff'd. 506 F.2d 287 (6th Cir. 1974) (420 miles).

[37]In the face of these serious deprivations, the Solicitor General contends that the liberty interests in *Wolff* were only recognized because "the State had bound itself by regulations and a course of practice . . . to impose solitary confinement [or to forfeit good time] *only on account of misconduct.*" [S.G. Br. at 20-22]. (emphasis supplied). Thus he argues that since neither Massachusetts nor the federal government has similarly bound itself to transfer a prisoner only because of misbehavior, there is no protected liberty interest. The assumption of this argument is that a statute or regulation must create a mutual understanding between prisoners and prison officials that good time will not be taken away nor solitary confinement imposed except upon allegations of misconduct. Even if this argument is relevant to the analysis of respondents' property interest, it reflects a serious misunderstanding of the nature of the liberty interest. See note 21, *supra*. A person's liberty interest does not turn on the perceived seriousness of the behavior which triggers its deprivation; it depends upon the nature and seriousness of the deprivations imposed. A prisoner's liberty interest should be no less implicated if good time were forfeited or if solitary confinement were imposed after an intrastate transfer. Conversely, an inmate's liberty might not be implicated if the sanction for serious misconduct was a brief cessation of lesser privileges. The fact that Nebraska reserved forfeiture of good time or solitary confinement for violations a major misconduct does not define the substance or content of an inmate's liberty; it only serves to further substantiate the compelling need for a hearing to ensure a reliable determination of whether the charged behavior has occurred. Cf. *In re Gault*, 387 U.S. 1, 21 (1967); *Robbins v. Kleindienst*, 383 F.Supp. 239, 248 (D.D.C. 1974).

b. Liberty Interest in Institutional Reputation.

The stipulation reflected that the respondents were not merely transferred to more adverse conditions but also that they were identified as troublemakers in their institutional files (App. 62).

An inmate, like any other person in our society, has a cognizable liberty interest in avoiding the adverse consequences which flow from an arbitrary designation or classification. The right to challenge a "stigma" or "badge of disgrace" does not turn on the status or maturity of the individual, for an alleged alcoholic, *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), or a school child in his formative years, *Goss v. Lopez*, 419 U.S. 565, 574 (1975) is as entitled to the protections of the due process clause as any other citizen of our country. Nor is the prisoner any less protected because he is incarcerated, since this liberty interest attaches to all individuals, regardless of the power of the State to deal with a particular activity or endeavor. See e.g., *Wisconsin v. Constantineau, supra*, 400 U.S. at 436 (alcoholic beverages); *Goss v. Lopez*, 449 U.S. 565, 574 (1975) (elementary schools); *Board of Regents v. Roth*, 408 U.S. 564 (1972) (state colleges and universities).

This liberty interest is substantially affected by the notation in respondents' files that they were transferred from a medium to maximum security institution on the basis of allegations of misconduct. The prisoner's identity within the prison is embodied in his institutional file. Cohen, *The Discovery of Prison Reform*, 21

Buffalo Law Review 855, 879 (1972).[38] His progress throughout the correctional system, the severity and duration of his prison experience, his custody level[39] and parole[40] are too closely linked to his institutional

[38]This identification results, in large part, from the integration of the inmate into the correctional system. E. Goffman, *Asylums* 18-19 (Anchor ed. 1961). When a convicted person first enters prison, he is evaluated and classified at a certain custody level. Sirico, *Prisoner Classification and Administrative Decisionmaking*, 50 Texas L. Review 1229, 1230-1235 (1972) (Study of Federal Correctional Institution at Texarkana, Texas). Given the nature of the prison community, this file subsequently becomes a repository of information about all aspects of the inmate's behavior. *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973).

[39]See generally, Gifis, *Nature of Decisionmkaing in a Prison Community*, 1974 Wisconsin Law Review 349 (Study of Massachusetts Correctional Institution, Concord). The file on the prisoner follows the prisoner through his term of incarceration and affects "his future [within the correctional system] with unwarranted authority," Sirico, *supra*, note 38 at 1231. The pressures and demands upon prison officials and employees in the day to day administration of a prison system almost always compel them to reach immediate decisions, affecting substantial interests of prisoners, on the basis of this file. See D. Glaser, *The Effectiveness of a Prison and Parole System* 132 (Abridged edition, 1969); Bourde, *The Use of Involuntary Inter-Prison Transfer as a Sanction*, 3 Am. Journal of Criminal Law 117, 134 (1974); Sirico, *Prisoner Classification and Administrative Decisionmaking*, 50 Texas L. Rev. 1229, 1240-1241 (1972); Bergeson and Hoerger, *Judicial Misconceptions and the Hidden Agenda in Prisoners' Rights Litigation*, 14 Santa Clara L. Rev. 747, 766, note 53 (1974).

[40]Decisions on parole are also based on hurried assessments of an inmate's file. See e.g., *Report on New York Parole: A Summary*, 11 Criminal Law Bulletin 273, 285 (1975); Foote, "The Sentencing Function" 17, 25, reported in Annual Chief Justice Earl Warren Conference on Advocacy in the United States (American Trial Lawyers Foundation, 1972). Cohen, *The Discovery of Prison Reform*, 21 Buffalo Law Review, 855, 880 (1972); President's Commission on Law Enforcement and the

(continued)

file to permit the negative implications arising from transfers to more adverse conditions of confinement on the basis of allegations of serious misconduct to remain unchallenged throughout his term of confinement. Moreover, this adverse designation cannot be mitigated or removed by virtue of the inmate's subsequent conduct, no matter how exemplary. *Cardaropoli v. Norton*, 523 F.2d 990, 995 at note 11 (2d Cir. 1975); *Catalano v. United States*, 383 F.Supp. 346, 350 (D. Conn. 1974). If this stigma has been attached without a sufficient basis, the prisoner may, in effect, be punished anew each time his record is reviewed. See *Gomes v. Travisono*, 490 F.2d 1209, 1213 (1st Cir. 1973) vac. and remanded, 418 U.S. 909 (1974), opinion on reconsideration after remand, 510 F.2d 537 (1974). Cf. *Burgett v. Texas*, 389 U.S. 109, 115 (1967). See also, *Hudson v. Hardy*, 424 F.2d 854, 856 (D.C. Cir. 1970). Consequently, the interference with respondents' rehabilitation and eventual release is substantial, for it would be unrealistic to assume that the Parole Board[41]

(footnote continued from preceding page)

Administration of Justice: Corrections 63 (1967). See the description of the North Carolina Parole process in the ***Brief for the United States as Amicus Curiae in Weinstein v. Bradford***, No. 74-1287 at 6-7 for an illustration of the Parole Board's dependence on an inmate's institutional file.

[41]The Solicitor General contends that the consideration of illegal transfers by the Parole Board in the future is irrelevant to the existence of a cognizable liberty interest because respondents have no more than a "unilateral" expectation of parole. Moreover, he argues that, even if the due process clause applies to the parole release process, the prisoner could be adequately protected by a hearing on the transfer decision before the Parole Board. Finally, *amicus* argues that any adverse consequences of the transfer can be avoided by expunging the record of the transfer from the files before the Parole Board.

These arguments again reflect a failure to distinguish between liberty and property interests, for this Court's prior cases did not require a showing of a vested right or interest to implicate the

(continued)

and other correction officials, is assessing the respondents' suitability for release upon parole or work-release or for participation in other rehabilitative programs, will ignore the fact that respondents were transferred from Norfolk for setting fires, possessing weapons and trafficking in contraband.

The transfers also seriously damage the respondents' standing and associations in the highly disciplined, authoritarian life of the prison community. Cf. *Goss v. Lopez*, 419 U.S. 565, 575 (1975). At the transferee institution, the respondents will undoubtedly be viewed critically by prison officials and employees as well as by inmates. Prison officials will ordinarily perceive the new inmate as an adjustment problem or "troublemaker"

(footnote continued from preceding page)

"liberty" interest in one's reputation, not to a property interest. For example, in *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), the Court did not require a showing that the respondent had a vested interest in buying liquor in upholding the individual's right to challenge the "badge of infamy" in that case.

Second, *Amicus* ignores the nature of parole board decision-making and the considerable pressures on the Parole Board. It is wholly impractical to conclude that a Parole Board will review prison transfers, in addition to the myriad other factors it considers, in making a parole decision. Moreover, even if the Board did consider the transfer, the prison inmate would be called upon to discuss an event which might have occurred some time in the past, and the prisoner would have slight chance of rebutting the adverse inferences flowing from a transfer based on allegations of misconduct. *United States ex rel. Haymes v. Montanye*, 505 F.2d 977, 982 (2d Cir. 1974) cert. granted 422 U.S. 1055 (1975). Cf. *Peyton v. Rowe*, 391 U.S. 54, 62 (1968).

Finally, expungement of the notation of a transfer would be inconsequential if the inmate's file reflected, without any explanation, his presence in another, more secure institution. Indeed, such unexplained entries in a record would increase, rather than minimize, the attention directed to the transfer.

who warrants close scrutiny and rigid controls.[42] Difficulties of orientation of the most fundamental sort could result for the alleged "troublemaker" in the new prison since "labels generally influence the way in which correctional employees view and deal with an inmate on a day to day basis."[43] Also, fellow prisoners are frequently hostile to transferees, possibly because they view them as "stool pigeons" who have been transferred to protective custody reasons.[44]

In an effort to minimize the adverse consequences to respondents' reputations, the petitioners contend that the criminal sentence is the stigma,[45] and the additional

[42]See *Attica:* The Official Report of the New York State Special Commission on Attica, 121, 133 (Bantam ed. 1972) [hereinafter *Attica*].

[43]Sirico, *supra* at note 38, 1232. See *Attica*, 133.

[44]See the careful findings of the district court in *Gomes v. Travisono*, 353 F.Supp. 457, 462 (D.R.I. 1972). One observer of the prison community noted that the epithet of "stool pigeon" is the worst possible "badge of infamy" for the prisoner in his community. Sykes, *supra* note 28 at 87-90. Cf. *Wieman v. Updegraff*, 344 U.S. 183, 191 (1952); *Board of Regents v. Roth*, 408 U.S. at 565, 573 (1972).

[45]There is little doubt that a criminal conviction imposes a stigma and hardship upon the inmate which often results in indelible damage to his reputation in the outside world. Special Project, *The Collateral Consequences of a Criminal Conviction*, 23 Vanderbilt Law Review No. 5 (May, 1970). Such deprivations, however harsh, are tolerated, not because the person is labelled a "criminal" but because he was afforded due process protections prior to the deprivation of his liberty. Similarly, a prisoner is afforded the protection of various constitutional provisions, including the guarantee of due process of law, regardless of the offensiveness of his original criminal conduct. *Wolff v. McDonnell*, *supra*, 418 U.S. 539, 555-556 (1974).

characterization of an inmate as a troublemaker is of little consequence. [Pet. Br. at 19, note 7.] However, reputations, like any other liberty interests and constitutional rights of the prisoners, are not left behind at the prison gates, *Wolff v. McDonnell*, 418 U.S. 539 (1974). See also, *Procunier v. Martinez*, 416 U.S. 396, 428 (1974) (Marshall, J. concurring). The necessity for restriction of the exercise of a prisoner's rights flows, not from a lack of sensitivity to the dignity of the prisoner, but from a need to accommodate legitimate penal objectives. However, there is no legitimate penal objective which justifies the imposition of an additional "badge of infamy" upon an inmate in a fashion that will affect the nature, severity and, perhaps length of his entire period of incarceration. The chances of good faith error, misjudgment, or official caprice are all too present to allow such state action to be undertaken without due process safeguards. Indeed, the particular circumstances of prisoners should compel the Court to be more vigilant in ensuring an adequate opportunity to challenge disparagements of their character. Precisely because of their conviction and sentence, prisoners have a substantial interest in restoring their good name, especially in the face of public accusations of the State that they continue to engage in anti-social conduct within the correctional environment. The "slave of the State" doctrine,[46] which this argument of petitioners recalls, should remain a discarded vestige of a former era and not become a contemporary reality.

[46]*Ruffin v. Commonwealth*, 62 Va. (21 Grath) 790, 794-796 (1871).

In summary, respondents have suffered immediate, substantial and indeterminate adverse changes[47] in the scope and quality of their conditions of confinement.[48] These changes deprive them of the "liberty" protected by the Due Process Clause and require the application of minimal procedural protections prior to their transfers.

[47]Petitoners and *amicus* substantially rely on *Board of Regents v. Roth*, 408 U.S. 564 (1972) to suggest that respondents' liberty interest was not implicated in their transfers. However, the vast differences between the present situation and that in *Roth* are more obvious than the similarities. *Roth* did not consider at all the direct, immediate and adverse restraints upon bodily movement which the respondents suffered and which remain at the core of liberty. Also, the Court specifically noted in *Roth* that the State did not make any charge of misconduct against the teachers; the opposite is true on the record before this Court since the transfers directly put at issue the respondents' reputation and character. Finally, there was no evidence in *Roth* that the State limited *Roth*'s options for alternative opportunities. In contrast to the sparse record in *Roth*, the petitioners' stipulation acknowledges that respondents' rehabilitative program involvement will be affected by the notation in their file. See also, *Cardaropoli v. Norton*, 523 F.2d 990, 995, note 11 (2d Cir. 1975). Therefore, *Roth* highlights rather than diminishes the nature and extent of respondents' deprivations of liberty stemming from the transfers.

[48]Lower courts have uniformly recognized, after careful and considered analysis of various factual patterns, that similar consequences of a transfer require the application of the Due Process Clause. *Newkirk v. Butler*, 364 F.Supp. 497, 503 (S.D.N.Y. 1973) aff'd 499 F.2d 1214 (2d Cir. 1974) vac. and remanded with instructions to dismiss as moot, 422 U.S. 395 (1975); *Montanye v. Haymes*, 505 F.2d 977 (2d Cir. 1974) cert. granted 422 U.S. 1055 (1975); *Carroll v. Sielaff*, 514 F.2d 415 (7th Cir. 1975); *Stone v. Egeler*, 377 F.Supp. 115 (W.D. Mich. 1973) aff'd 506 F.2d 287 (6th Cir. 1974); *White v. Gillman*, 360 F.Supp. 64 (S.D. Iowa 1973); *Aikens v. Lash*, 371 F.Supp. 482 (N.D. Ind. 1974); *Walker v. Hughes*, 386 F.Supp. 32 vacating 375 F.Supp. 708 (E.D. Mich. 1974); *Robbins v. Kleindienst*, 383

(continued)

2. The Respondents Possess A Legitimate Claim of Entitlement To The Rights And Benefits Attached to Confinement At MCI, Norfolk Since Massachusetts Has Organized Its Prisons To Provide Graduated Conditions of Confinement On The Basis of Conduct.[49]

The scope of property, like that of liberty, is not constricted by rigid, formalistic definitions. *Board of Regents v. Roth*, 408 U.S. 564, 571-572 (1972). Instead, the procedural protection of property "is a safeguard of the security of interest that a person has already acquired in specific benefits." *Board of Regents v. Roth, supra*, 408 U.S. at 576-577; *Goss v. Lopez, supra*, 419 U.S. at 573. These interests are "not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source *such as* state

(footnote continued from preceding page)

F.Supp. 239 (D.D.C. 1974); *Clonce v. Richardson*, 379 F.Supp. 338 (W.D. Mo. 1974). See also, National Advisory Committee on Criminal Justice Standards and Goals, Corrections, Standard 2.13 at 54-55 (1973) where an expert panel of individuals involved in corrections recognized that a hearing is necessary because "decisions [involving changes of custody levels] can have a critical effect on the offender's degree of liberty, access to correctional services, basic conditions of existence within a correctional system, and eligibility for release." See also, Bourde, *The Use of Involuntary Inter-Prison Transfer as a Sanction*, 3 Am. Journal of Criminal Law 117, 159-163 (1974); Millemann and Millemann, *The Prisoner's Rights to Staty Where He Is: State and Federal Compacts Run Afoul of Constitutional Due Process*, 3 Cap. U. L. Rev. 223 (1974); Note, *Procedural Due Process in the Involuntary Institutional Transfer of Prisoners*, 60 Va. L. Rev. 333 (1974).

[49]The Court of Appeals did not have to find that the transfer of the respondents affected their property interest protected by the Fourteenth Amendment since the majority recognized that respondents' liberty interest was implicated in their transfer.

law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) (emphasis supplied); *Goss v. Lopez*, 419 U.S. 565, 572-573 (1975). Such understandings do not necessarily have to flow from sources of positive law, like statutes or administrative regulations, for "[i]t is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 599-601 (1972).

To properly evaluate respondents' property interests, it is necessary to review briefly the complex interplay of statutes and administrative practice which underlies the Massachusetts correctional system.

Massachusetts statutes explicitly emphasize the rehabilitation of the offender and his reintegration into the community as the principal goals of corrections in the state. These statutes specifically require the Commissioner of Corrections "to establish, maintain and administer programs of rehaiblitation [for prisoners] . . . designed as far as practicable to prepare and assist each such person to assume the responsibilities and exercise the rights of a citizen of the Commonwealth." M.G.L.A. Ch. 124, sec. 1(e) (1974 ed) and "to establish a system of classification for [prisoners] the purpose of developing a rehabilitation program for each such person." M.G.L.A. Ch. 124, sec. 1(f) (1974 ed). See also, M.G.L.A. Ch. 127, sec. 48 (1974 ed) (establishing work-release). To effectuate this legislative purpose, the Department of Correction has established graduated conditions of confinement at the state prisons within Massachusetts (App. 135), and incarceration in a particular prison results in the inmate's acquisition of various rights and benefits. These may include a range of opportunities, including work-release[50] and educational programs, increased availability of furloughs and eligibility for other rehabilitative programs (App. 62).[51] The "bundle" of rights and benefits available to a prisoner varies depending upon where he is incarcerated.[52]

Furthermore, the inmate's level of custody in Massachusetts and opportunities for program involvement are related to his conduct within the prison system.[53] Transfer to lower custody status, with the concomitant increase in benefits and opportunities, is predicated upon the inmate's "capacity to take on greater responsibility . . . giving him more freedom, so that at release the transition from life in a correctional

[50]Educational and work-release programs in Massachusetts were established by M.G.L.A. Ch. 127, secs. 48 and 49 (1974 ed). For participation in these rehabilitative programs, the inmate must "demonstrate that he is responsible and deserving of these opportunities." M.G.L.A. Ch. 127, sec. 49A (1974 ed).

[51]See pages 21-22, *supra*.

[52]It is irrelevant, for purposes of the effect on respondents' property interest, that Massachusetts did not have to create a corrections system with graduated conditions of confinement. *Fano v. Meachum*, (App. 150); *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

[53]A former Acting Commissioner of Correction described the philosophy of the Massachusetts Department of Correction in the following terms:

> The classification process and the range of correctional programs are meant to provide opportunities for change . . . As the inmate demonstrates his capacity to take on greater responsibility, the controls of his correctional environment should be relaxed, giving him more freedom, so that at release the transition from life in a correctional facility to life on the street will be a relatively smooth one.

Hearings Before Subcommittee No. 3 on Corrections of the Committee on the Judiciary of the House of Representatives, 92

(continued)

facility to life on the street will be a relatively smooth one."[54] Within the correctional system, inmates thus have the right to be treated "with the kindness which their obedience, industry and good conduct merit." M.G.L.A. Ch. 127, sec. 32 (1974 ed).

Therefore, an inmate in Massachusetts is entitled to progress through a series of reduced controls and increased program opportunities as long as he is not involved in acts of misconduct which demonstrate his inability to remain at that custody level. See also, *Daigle v. Hall*, 387 F.Supp. 652, 659 (D. Mass. 1975). Conversely, if the prisoner's "obedience, industry and good conduct" do not merit confinement in a particular institution, he may be transferred and lose the rights

(footnote continued from preceding page)
Congress (First Session) Part V: *Prisons, Prison Reform and Prisoners' Rights*, Massachusetts (December 18, 1971). Thus, the prison system in the Commonwealth reflects a system of gradual relaxation of controls and custody as an inmate progresses in behavior.

The Solicitor General acknowledges that a similar situation prevails in the federal system [S.G. Br. at 3, note 3]. See Norman A. Carlson, *The Federal Prison System: Forty-Five Years of Change*, 39 Federal Probation 37, 38 (June, 1975), where the Director of the Federal Bureau of Prisons describes the federal system as follows:

> A correctional continuum emerged, designed to give inmates an opportunity to improve their chance for post-release success while making gradual transition from a life of confinement to the freedom of society.

[54]See *note* 53, *supra*.

and benefits provided at that prison.[55] Thus, a claim of entitlement has evolved in Massachusetts from this interrelationship of state law and administrative practice, upon which prisoners legitimately can rely when they move from one prison to another.[56] Such an arrangement allows state inmates to participate in the rehabilitative programs at a particular institution and to

[55]Petitioners appear to concede as much when they state:

> Any inmate confined within the Massachusetts correctional system is subject to transfer, no matter how exemplary his conduct at an institution. As a matter of practice, of course, this rarely occurs . . . [Pet. Br. at 22].

See also, E. Powers, *supra*, note 31:

> The courts do not commit men to Norfolk. Selected inmates sentenced to Walpole or Concord are transferred there where most of them serve out their terms, while a few, *found not suitable for a medium security institution, are returned to their original institutions. Id.* at 211. (emphasis supplied.)

[56]Consequently, the instant circumstances find their analogue in *Perry v. Sindermann*, 408 U.S. 593 (1972) rather than in *Board of Regents v. Roth*, 408 U.S. 564 (1972), upon which the petitioners rely. In the latter case, the notice of Roth's faculty appointment explicitly provided for the specific termination date of his employment. *Board of Regents v. Roth, supra*, 408 U.S. at 566. In *Perry*, however, the asserted property interest was an understanding shared by faculty and administration of the school's tenure policy. *Perry v. Sindermann, supra*, 408 U.S. at 599-600. The respondents contend that a similar understanding has developed in Massachusetts as a result of the emphasis on rehabilitation and the establishment of graduated conditions of confinement predicated on the behavior of the prisoner.

partake of the rights and benefits at that prison, absent serious misconduct on their part.[57]

The record confirms the nature of respondents' property interest in the instant case. Petitioners terminated the prisoners' participation in rehabilitative programs at Norfolk and limited their opportunities for such statutorily and administratively created programs by transferring respondents to Walpole. In making these determinations on the basis of allegations of respondents' misbehavior, petitioners concluded that the prisoners' conduct was "prohibitive to rehabilitative

[57]Petitioners [Pet. Br. at 21] and the *amicus* [S.G. Br. at 13-14] misconceive the nature of the respondents' property interest. The respondents are not asserting a claim of entitlement to be in a particular institution; they are contending that once they are in a position to enjoy the rights and benefits at a particular institution or classification level, they have a legitimate claim of entitlement to these benefits. Furthermore, Massachusetts may not be constitutionally obligated to establish a system which stresses rehabilitation of the offender and his reintegration into the community; however, the state has not only asserted that rehabilitation and reintegration are the primary purposes of corrections within its jurisdiction, but also, Massachusetts has required the Commissioner to develop a series of programs, opportunities and benefits for inmates to accomplish these statutory goals. Cf. *Goss v. Lopez*, 419 U.S. 565, 576; *Wolff v. McDonnell, supra*, 418 U.S. 539, 557-558. See also, *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

It is interesting to note that the prisoners' interest in the present case is identical to that acknowledged by the Bureau of Prisons in *Cardaropoli v. Norton*, 523 F.2d 990, 995 at note 11 (2d Cir. 1975). The Bureau of Prisons' contention in *Cardaropoli*, as presented to the court, was that "[o]nly subsequent to the [initial] classification, *after the inmate has been enjoying the benefits allowed within that classification, can he have a legitimate claim of entitlement to those benefits*" [emphasis supplied]. The Government's position in this case, therefore, appears grounded upon convenience, rather than upon consistent constitutional analysis.

programming at MCI, Norfolk" (App. 175) or reflected an unwillingness or inability "to accept the responsibility comensurate [sic] with assignment to MCI, Norfolk, a medium security facility" (App. 53).[58]

However, petitioners suggest that the losses suffered by respondents are not of sufficient substance to affect the property interest protected by the Due Process Clause. Petitioners' position is refuted by prior decisions of this Court. As the Court recently noted:

> [I]n determining whether due process requirements apply in the first place, we must look not to the 'weight' but to the nature of the interest at stake . . . [T]he length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing "is not decisive of the basic right" to a hearing of some kind . . . *The Court's view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. Goss v. Lopez, supra*, 419 U.S. 565, 575-576 (emphasis supplied and citations omitted).

The deprivations to the respondents occasioned by their transfers are certainly not *de minimis*. Within the Massachusetts prison system, which emphasizes the reintegration of the offender into the community, educational and rehabilitative opportunities, work-release and furloughs are critical for the prisoner and enable him to establish a positive record for the Parole Board.[59] These benefits and opportunities also vitally

[58]See *note* 55, *supra*.

[59]Participation in these programs may have a real effect on the duration of respondents' sentences as well, for the Massachusetts legislature has directed that additional good time be awarded for participation in educational, vocational and other rehabilitative programs. M.G.L.A. Ch. 127, sec. 129D (1974 ed).

assist the inmate with his own self-development. Thus, the importance of these opportunities in the prison environment cannot be over-emphasized. See *Catalano v. United States, supra*, 383 F.Supp. at 351. Finally, the exclusion of respondents from these programs is not just a temporary one; it is indefinite and they could be forever barred from participation in meaningful rehabilitative activities. Cf. *Goss v. Lopez*, 419 U.S. 565, 576 (1975). Therefore, a prisoner in Massachusetts has a legitimate claim of entitlement to rehabilitative opportunities "which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that clause." *Goss v. Lopez*, 419 U.S. 565, 574 (1975).

B. The Preservation of the Minimal Due Process Protections Guaranteed by *Wolff v. McDonnell* Necessitates the Application of the Due Process Clause to Petitioners' Decisions to Transfer Respondents.

Wolff v. McDonnell, 418 U.S. 539 (1974) reflects a careful examination of the due process considerations involved in internal prison administration. In an effort to avoid the procedures mandated by *Wolff*, petitioners [Pet. Br. at 28] and the *amicus* [S.G. Br. at 15-16] assert that transfers to more adverse conditions of confinement, including those at issue in the present case, involve totally different considerations than disciplinary adjudications and, as a consequence, these transfer decisions should be immune from the *Wolff* requirements. Even if petitioners' characterization of transfers accurately reflects the decisionmaking process in

prisons, either in general or in the present record, it begs the question of whether this Court, in order to preserve the force of *Wolff*, should require that procedural due process be accorded a prisoner who is transferred to more adverse conditions on the basis of alleged misconduct. Since the position advanced by petitioners has grave consequences for the continued application of the constitutional safeguards ordered in *Wolff*, their arguments should be closely scrutinized.

Petitioners' contention, to be fully understood, must be reviewed in the context of the close interrelationship between prison discipline and the reclassification transfer of an inmate to more restrictive conditions on the basis of misbehavior.

Classification has been described as "the development and administration of an integrated program of treatment for the individual, with procedures for changing the program when indicated."[60] Obviously, as petitioners concede, this process includes determinations about allegations of misconduct "which [indicate] inability to adjust in [the] general prison population"[61] [Pet. Br. at 28 and S.G. Br. at 15] [brackets supplied]. Through such a process, "classification not only contributes to the objectives of rehabilitation but also to custody, discipline, work assignments, officer and inmate morale, and the effective use of training

[60] See the *Regulations Governing Disciplinary and Classification Procedures at the Adult Correctional Institutions, State of Rhode Island* cited in *Morris v. Travisono*, 310 F. Supp. 857, 865 (D.R.I. 1970). These so-called *Morris* rules are often cited as a reflection of the combined efforts of prisoners and prison officials to devise a mutually accommodating system of regulations (See e.g. *Palmigiano v. Baxter*, 487 F.2d 1280, 1285, note 13 (1st Cir. 1973); therefore, they serve as an invaluable source of the general principles of prison decisionmaking.

[61] *Morris v. Travisono*, 310 F. Supp. 857, 868 (D.R.I. 1970).

opportunities."[62] The transfer to more adverse conditions on the basis of misconduct is the principal mechanism for increasing the number and degrees of control on an inmate's life in order to effectuate a variety of penal objectives, including rehabilitation, discipline and security. See e.g., *Wolff v. McDonnell*, 418 U.S. 539, 545, note 5 (4) (1974); *Robbins v. Kleindienst*, 383 F.Supp. 239, 242-244 (D.D.C. 1974); See also, Bourde, *The Use of Involuntary Inter-Prison Transfer as a Sanction*, 3 Am. Journal Criminal Law 117, 118 (1974).

The purpose of the disciplinary process has been described in strikingly similar terms. Indeed, the Nebraska prison officials in *Wolff v. McDonnell, supra*, 418 U.S. 539 (1974) asserted that the disciplinary process has a "major role on furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released." *Id.* at 562-563, and 548, note 8. The disciplinary process, like the classification process, often involves wide-ranging inquiries into a prisoner's behavior to further "correctional treatment goals." *Id.* at 571 (App. 109). Transfer is one of a variety of sanctions that may be imposed to effectuate these purposes (App. 117); *Robbins v. Kleindienst*, 383 F.Supp. 239, 244 (D.D.C. 1974) (Federal Bureau of Prisons).[63]

[62] *Id.* at 865.

[63] Bourde, *The Use of Involuntary Inter-Prison Transfer As a Sanction*, 3 Am. Journal of Criminal Law 117, 118 (1974). The author describes the use of the transfer as an adjunct to the disciplinary process at the federal minimum security prison in Seagoville, Texas.

Consequently, there is a substantial overlap between the disciplinary process and the reclassification by transfer of an inmate on the basis of misconduct. Both involve factual inquiries into the behavior of the inmate and the development of an appropriate response which takes into account the needs of the institution and of the individual. Thus, a transfer board might be called upon to determine whether an inmate has demonstrated "poor institutional adjustment" on the basis of his prior conduct, *Robbins v. Kleindienst, supra*, 383 F. Supp. at 243 or, as the boards convened by petitioners were required to do, to adjudicate whether specific inmates were linked to the planning and execution of fires, possessing contraband such as weapons, or trafficking in drugs (App. 39). Similarly, a disciplinary board will consider "the causes for the adverse behavior, the setting and circumstances in which it occurred, the man's accountability, and the correctional treatment goals." *Wolff v. McDonnell, supra*, 408 U.S. at 571. The lines are even further blurred when transfer is a possible consequence of both classification and disciplinary proceedings because, as correctional officials have candidly realized, "[i]n any penal system embracing several institutions, transfer from one to another is often an effective disciplinary procedure as well as an administrative necessity . . ." American Correctional Association, Manual of Correctional Standards 416 (1972).[64]

[64] See also, *Gomes v. Travisono*, 510 F.2d 537, 539 (1st Cir. 1974) (in disciplinary transfers the premise of finding an infraction and the consequences of such a finding cannot be distinguished from the penalty and findings in *Wolff*); Bourde, *The Use of Involuntary Inter-Prison Transfer as a Sanction*, 3 Am. Journal Criminal Law, 127, 129 (1975).

Of equal relevance, the transfer to more adverse conditions of confinement and the disciplinary sanction for misconduct have identical consequences for the inmate. *Wolff v. McDonnell, supra*, 418 U.S. at note 19; *Fano v. Meachum*, (App. 145, note 2). As a result of either process, a prisoner's educational and rehabilitative programs can be substantially disrupted, his custody level can be significantly altered, and his opportunities for involvement in programs can be hindered.

The general interrelationship of these two processes is starkly demonstrated by the record in the instant case. The respondents were originally furnished with disciplinary reports which charged them with alleged acts of misconduct constituting major violations of institutional rules. If the inmates had been provided with disciplinary hearings on these charges, they would have been afforded the full range of due process required by *Wolff*, including notice, a hearing and a written statement by the factfinders as to the evidence relied on and the reasons for the disciplinary action. *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974). The disciplinary board, after adjudication of the charged conduct, could then have considered the respondents' entire record (App. 115) and could have imposed transfer as a sanction (App. 117). By abruptly terminating the disciplinary process and pursuing the classification route, petitioners were able to avoid the strictures of *Wolff*, despite the fact that the alleged misbehavior considered by the Board was the same as that charged in the disciplinary reports.

The identical circumstances could arise in the future, whether as a result of inadvertence or intent on the part of prison officials. There is always the possibility, of course, that officials might arbitrarily employ the

transfer device as a means of avoiding minimal due process requirements. *United States ex rel. Haymes v. Montanye*, 505 F.2d 977, 980, note 4 (2d Cir. 1974). More likely, however, prison officials will be compelled by the speed and momentum of events to forego the more cumbersome disciplinary process for the administrative convenience of summary transfer, a decision they might not reach upon calmer reflection. Cf. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 149 (1950) (Frankfurter, J., concurring). See also, *Carlo v. Gunter*, 520 F.2d 1293 (1st Cir. 1975). Or a particular official, in the exercise of his good faith judgment, might misguidely propose transfer for "rehabilitation," "treatment" or "experimentation" which is indistinguishable from the imposition of a sanction for misconduct. See e.g., *Daigle v. Hall*, 387 F.Supp. 652, 658 (D. Mass. 1975); *Clonce v. Richardson*, 379 F.Supp. 338, 349 (W.D. Mo. 1974).[65] The procedural rights recognized in *Wolff* will be given short shrift in such situations.

[65]The use of euphemistic labels as a guise for punishment is already a reality in prison administration. See e.g., Hearings on Behavior Modification Programs; Federal Bureau of Prisons, 64, Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Committee on the Judiciary (93rd Congress, 2d Session) (February 27, 1974); *Individual Rights and the Federal Role in Behavior Modification* 7-10, 31-34, Committee on the Judiciary, United States Senate (93rd Congress, 2d Session) (November, 1974). This result is inevitable since treatment programs in prisons are invariably subordinated to custodial needs, with obvious consequences for the daily life of the inmate. Powelson and Bendix, *Psychiatry in Prison*, 14 PSYCHIATRY 73, 79, 80-83 (1951). Psychiatrists, with experience in the prison environment, recognize that often "the inmate is subjected to punitive practices which are represented as designed for his rehabilitation." *Id.* at 84.

Petitioners' solution to this dilemma, however, is to insulate transfer hearings from the due process clause on the ground that these hearings are "entirely different" from disciplinary hearings [Pet. Br. at 28]. This suggestion, while possessing simplicity, lacks every other virtue, for it would emasculate the constitutional force of *Wolff* and would result in substantial confusion in the administration of justice and of prisons in this country. At the core of petitioners' claim is the premise that there is some magical distinction which obtains from the use of labels such as "transfer," "administrative," "disciplinary" or "punitive." Yet petitioners concede that these formal distinctions have little meaning in the prison context for they recognize that "[a] transfer hearing . . . may bear aspects of a disciplinary hearing insofar as allegations of past misconduct may be heard" [Pet. Br. at 28].[66] Thus, the need is still present, as in *Wolff*, to ensure that the reasons for such a transfer are reliably found as a "hedge against arbitrary determination of the factual predicate for the imposition of the sanction." *Wolff v. McDonnell, supra*, 418 U.S. 571-572, note 19. The "paradox" of different constitutional treatment for the closely related disciplinary and transfer proceedings would be apparent to both inmates and prison officials since the need for reliable and accurate determination of the facts at issue is no less significant in either proceeding.[67]

[66]Respondents would agree that a prisoner does not have a constitutional right to two hearings on allegations of misconduct; therefore any adjudications at the disciplinary hearing could be relied on at a subsequent transfer hearing, absent a showing of an error on the face of the record or apparent procedural defects in the prior proceeding. Cf. *Morrissey v. Brewer*, 408 U.S. 471, 490 (1972).

[67]See *Gomes v. Travisono*, 490 F.2d 1209, 1215 (1st Cir. 1973); vac. and remanded 418 U.S. 909 (1974) opinion on reconsideration on remand 510 F.2d 537 (1st Cir. 1974).

Consequently, the gossamer distinctions proposed by petitioners tend to obscure rather than clarify constitutional analysis.[68] A similar realization led the Court to reject the disquieting results of the right-privilege doctrine as of little use in resolving issues of constitutional magnitude. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *Graham v. Richardson*, 403 U.S. 365, 374 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). The same results would obtain from elevating petitioners' emphasis upon labels to the level of constitutional doctrine. Bourde, *The Use of Involuntary Inter-Prison Transfer as a Sanction*, 3 Am. Journal of Criminal Law, 117, 159-163 (1974).

Finally, the consequences of requiring the application of due process for the imposition of discipline but not for transfer to more adverse conditions of confinement on the basis of misconduct would be devastating for the federal courts, prison officials and inmates. This dichotomy would necessitate endless judicial inquiries into whether a transfer to a higher custody status on the basis of allegations of misconduct was, in actuality, a "disciplinary" hearing. The judicial investigation into the "real" as opposed to the "purported" motive or

[68]In recognition of this problem, many lower federal courts have rejected "administration by label" and have focused instead on the effects of the transfer upon the inmate and the functional value of a hearing in the particular circumstances. See e.g., *Rosenberg v. Preiser*, 388 F. Supp. 639 (S.D.N.Y. 1975); *Robbins v. Kleindienst*, 383 F. Supp. 239, 248 (D.D.C. 1974); *Clonce v. Richardson*, 379 F. Supp. 338, 349 (W.D. Mo. 1974); *Kessler v. Cupp*, 372 F. Supp. 76, 77 (D. Ore. 1973). Post-*Wolff* cases have interpreted the decision in *Wolff* to compel such inquiries rather than an examination of "motive" or "purpose." See e.g. *Gomes v. Travisono*, 510 F.2d 537, 541 (1st Cir. 1974); *Fano v. Meachum* (App. 154, note 2).

purpose of the transfer would thrust the federal courts into a morass of subjective inquiry in the highly sensitive area of prison administration. See *Fano v. Meachum*, (App. 155-156) (Campbell, J., dissenting). Since each case would turn on its particular historical facts, the volume of litigation would produce little of consequence in the way of standards for prison administrators or inmates.[69] *Cf. Procunier v. Martinez*, 416 U.S. 396, 407 (1974).

Consequently, the petitioners' approach would soon transform the judicial guarantees of fairness in prisons, so recently recognized in *Wolff*, into hollow rights. Permitting the transfer of an inmate to escape the requirements of the Due Process Clause would signal the fact that fundamental rights in prisons are determined by prison officials, not by the Constitution. For these reasons, minimal due process safeguards must be provided prior to a transfer which results in adverse changes in the overall conditions of confinement, particularly in the present case since the transfer was predicated on allegations of past misconduct.

[69]This should be contrasted with the facts which must be evaluated when traditional constitutional analysis is employed and the effects of the transfer upon the inmate and the appropriateness of due process procedures in the particular circumstances are being considered. The progeny of *Goldberg v. Kelly*, 397 U.S. 254 (1970) attests to the familiarity and expertise of courts with these inquiries.

II.

THE TRANSFER HEARINGS FAILED TO MEET MINIMAL DUE PROCESS REQUIREMENTS BECAUSE THE NOTICE OF THE HEARINGS AND THE HEARINGS WERE INSUFFICIENT TO PROVIDE THE PRISONERS WITH A MEANINGFUL OPPORTUNITY TO RESPOND TO THE ALLEGATIONS OF MISCONDUCT.

Since the respondents were deprived of many substantial protected interests by their transfers, they were entitled to hearings that met the minimal requirements of the Due Process Clause. *Board of Regents v. Roth*, 408 U.S. 564, 569-578 (1972). The Court, therefore, must determine what specific processes are required in order to afford a fair adjudication of the relevant issues under the present set of circumstances. *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Wolff v. McDonnell*, 418 U.S. 539, 560 (1974); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In making this determination in the instant case, "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974); *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961).

After balancing the opposing interests of the parties in the present circumstances, the court of appeals ruled, in a carefully reasoned opinion (App. 144-156), that the hearings afforded the prisoners in this case were constitutionally deficient since (1) the notices of hearings given respondents were inadequate to inform them properly of the serious allegations against them

(App. 152) and (2) no summary was provided respondents of the *in camera* informant testimony relied on by the hearing board (App. 151-152).

A. A Careful Balancing Of The Countervailing Interests Demonstrates That The Respondents Were Entitled To The Minimal Procedural Requirements Extended To Prisoners In *Wolff v. McDonnell*.

This Court has already had the opportunity, in *Wolff*, to reflect at length on certain of the competing interests of prison officials and prisoners in determining the quantum of due process required for internal prison hearings where prisoners suffer the loss of good conduct time or a major adverse change in the conditions of confinement. The inmates in this case have an interest identical to the prisoners in *Wolff*[70] in avoiding the immediate and substantial deprivations which result from transfer to more adverse conditions on the grounds of alleged misconduct without due process of law. Moreover, the function of the respondents' hearings was to adjudicate allegations of serious misconduct on the part of the prisoners.[71] Therefore, both parties had an equal interest in ensuring that the

[70]In some respects, the consequences of respondents' transfers may be more serious than those flowing from the loss of good time or from solitary confinement. Good time may be restored to the inmate in the future while the stigma associated with an intrastate transfer based on allegations of misconduct will be permanent, regardless of the subsequent exemplary behavior of the inmate. Also, solitary confinement is usually of limited duration. See M.G.L.A. Ch. 127, sec. 40 (1975 ed.) However, this is not the case when an inmate is transferred to more restrictive conditions, for he may remain there indefinitely.

[71]See Brief For Respondents, pp. 2-4.

decisions to transfer had been reached fairly and on the basis of accurate and reliable information.[72] *Richardson v. Perales*, 402 U.S. 389, 401-402 (1971); *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973); *Robbins v. Kleindienst*, 383 F. Supp. 239, 247-248 (D.D.C. 1974). A hearing in this context would be far from an empty form and would prod prison officials to live up to their obligations to review the facts impartially. The state has an interest similar to the inmate's in ensuring reliable and accurate information, an interest acknowledged by the petitioners in the instant case when they afforded prisoners a "hearing" to inquire into the allegations of misconduct.[73]

[72]Petitioners recognize this interest as well when they acknowledge that the state's concern in the security of its institutions cannot be served by transfers based on "arbitrary or capricious information." (Pet. Br. 33). Petitioners assert, however, that the requirement of accuracy is satisfied by the good faith of prison officials. (Pet. Br. 23). However, "a conclusion [that] satisfies one's private conscience does not [necessarily] attest to its reliability." *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, 341 U.S. 123, 171 (1951). Errors may also have unintentional origins. See, Sirico, *Prisoner Classification and Administrative Decisionmaking*, 50 Texas L. Rev. 1229, 1242-1243 (1972). Good intentions on the part of prison administrators do not obviate the need for due process. Cf. *In re Winship*, 397 U.S. 358, 365-366 (1970).

As one observer of prisons has noted, abdication to the "good faith" of prison administrators has unfortunate consequences:

> The elusive goal of rehabilitation spawns decisionmakers desirous of unfettered discretion ot tinker with the prisoners' fates. *Secure in the knowledge of their own good faith, they often do not appreciate their ability to err, become indifferent to the awesome power they wield, and fail to recognize the responsibility placed on them by the lack of checks on their discretion.* Sirico, *supra* at 1239-1240.

[73]See note 72, *supra*.

In light of these considerations and of the balance already struck in *Wolff*, petitioners are required to provide minimal due process protections unless they can demonstrate that legitimate penal objectives justify further limitations in the instant case.

Numerous interests are asserted by petitioners and *amicus* for not requiring transfer hearings. However, many of these interests have already been accommodated by the balance struck in *Wolff*. The others are not appropriate for consideration on the record before this Court since the respondents' transfers were based on allegations of serious prior misconduct.

1. Security needs, avoidance of "tensions" and rehabilitation.

Petitioners and the Solicitor General argue that security needs, rehabilitation and the avoidance of "tensions" necessitate a summary transfer process. However, the Court in *Wolff* accommodated these interests in requiring minimal due process protections for disciplinary proceedings in the unremitting tension of a maximum security prison. *Wolff v. McDonnell*, 418 U.S. 539, 562 (1974). Petitioners and *amicus* have not pointed to anything in the medium security environment of Norfolk which prevented them from conducting hearings for respondents on the allegations of prior misconduct. Vague, generalized notions of prison security, unsupported by the present record, should not be sufficient to tip the careful balance struck by *Wolff*.

Moreover, contrary to their position, [Pet. Br. at 24-25] [S.G. Montanye 42-45],[74] the results of careful

[74]The *Amicus* relies primarily on the case of *Braxton v. Carlson*, 483 F.2d 933 (3rd Cir. 1973) [S.G. Montanye at 43], which was decided before *Wolff v. McDonnell*, 418 U.S. 539 (1974).

investigations into prison decisionmaking prove that a reduction in tensions obtains from fair procedures in prisons. See e.g., Note, *Bargaining in Correctional Institutions: Restructuring The Relation Between The Inmate and The Prison Authority*, 81 Yale L.J. 726 (1972); D. Glaser, *Effectiveness of a Prison and Parole System* 87 (Abridged ed. 1969); *The President's Commission on Law Enforcement and Administration of Justice: Corrections* 83 (1967). Indeed, it is likely that tensions would be exacerbated by an unexplained decision or, as in the instant case, by a ritualistic, Kafkaesque process, rather than by the provision of a hearing, for in the former situations, the prisoner can only assume that prison officials acted arbitrarily and unreasonably. See *Catalano v. United States*, 383 F. Supp. 346, 351 (D. Conn. 1974). See also *Clonce v. Richardson*, 379 F. Supp. 338, 351 (W.D. Mo. 1974).

Finally, both national commissions which have recently studied prisons have concluded that rehabilitation is not furthered by "authoritarian control" [S.G. Br. Montanye at 26][75] but by procedures which avoid reactions to arbitrariness by maximizing an inmate's participation in decisions which affect his life. *President's Commission on Law Enforcement and Administration of Justice: Corrections* 13, 82-84 (1967); *National Advisory Commission on Criminal Justice Standards and Goals: Corrections* 55 (1973). See also,

[75]A careful reading of Glaser, *The Effectiveness of a Prison and Parole System* 122-123 (1969) and Ohlin, *Modification of the Criminal Value System*, in *The Sociology of Punishment and Correction* (1962), which are cited by *amicus* [S.G. Montanye at 26], supports a position contrary to that asserted by the Solicitor General. Both authors stress the need for fairness in proceedings and closer inmate-staff relationships as a means of ensuring rehabilitation of the prisoner.

D. Fogel, *We Are The Living Proof: The Justice Model of Corrections* 204-208 (1975); Fox, *Why Prisoners Riot*, 35 Fed. Prob. 9 (1971); Note, *Bargaining In Correctional Institutions: Restructuring The Relation Between The Inmate and the Prison Authority*, 81 Yale Law Journal 726 (1974); Cf. *Palmigiano v. Baxter*, 487 F.2d 1280, 1283 (1st Cir. 1973); *Landman v. Peyton*, 370 F.2d 135, 141 (4th Cir.) cert. den., 385 U.S. 881 (1966).[76]

2. The "Emergency" Justification

The petitioners and *amicus* argue that the requirement of a hearing would prevent prison officials from dealing with emergencies. The record in this case, however, belies this contention, for the petitioners were able to handle adequately a perceived emergency by segregating the respondents (App. 55-56) and by still affording them a "hearing" prior to their transfers. The appropriateness of the "emergency" justification should await a record that suggests that prison officials were prevented by an emergency from providing any hearings for inmates charged with past misconduct.

In addition, this Court had already recognized that there are "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). See also, *La Batt v. Twomey*, 513 F.2d 641, 645-646 (7th Cir.

[76]Prison officials in Massachusetts also recognize the close relationship between rehabilitation and fair proceedings. Commissioner's Bulletin 72-1 describes the policy of the disciplinary rules as follows: "These rules are promulgated in the belief that a *speedy and fair adjudication of alleged wrong-doing coupled with meaningful sanctions contributes to the maintenance of security and the rehabilitation of the resident.*" (App. 109) (emphasis supplied)

1975); *Goss v. Lopez*, 419 U.S. 565 (1975); *Gomes v. Travisono*, 490 F.2d 1209, 1215 (1st Cir. 1973) vacated and remanded *sub nom. Travisono v. Gomes*, 418 U.S. 909 for reconsideration in light of *Wolff v. McDonnell*, opinion on reconsideration after remand 510 F.2d 537 (1st Cir. 1974); *Hoitt v. Vitek*, 361 F. Supp. 1238, 1253 (D. N.H. 1973), aff'd 497 F.2d 598, 600 (1st Cir. 1974).

Consequently, in emergency situations, prison officials would still be able to postpone whatever procedures are required. See *Gomes v. Travisono*, 510 F.2d 537, 539 (1st Cir. 1974); *La Batt v. Twomey*, 513 F.2d 641, 645-646 (7th Cir. 1975). The "emergency" doctrine, rather than the wholesale authorization of summary transfers, reflects an appropriate concern for the pressures on prison authorities without sacrificing the inmate's rights to procedural fairness.[77]

3. The asserted need to make discretionary decisions

Petitioners repeatedly assert that the question of transfer should be left to the sound discretion of prison officials (Pet. Br. 26, 27, 28, 33).

However, the record again does not support petitioners' argument. Petitioners are unable to point to anything in the present record that would suggest that their discretion was limited in the instant case by the

[77]However, the necessary due process protections should be provided "as soon as practicable" after the transfer. *Goss v. Lopez, supra*, 419 U.S. 565, 582-583 (1975). See also *Hoitt v. Vitek*, 497 F.2d 598, 600 (1st Cir. 1974) (unreviewable discretion of prison officials in what they view to be an emergency is not open ended or time limited).

provision of hearings for the respondents prior to their transfers. Moreover, the nature of the hearings afforded the respondents does not support petitioners' general assertion that transfer proceedings involve broad discretionary considerations; indeed the very opposite appears to be the case, for the record reflects that the decisions to transfer respondents were based on adjudications of allegations of the prisoners' prior misconduct.[78]

Furthermore, regardless of the circumstances, "(a) simple factual hearing will not interfere with the

[78]Petitioners find support for their argument in Judge Campbell's dissent in *Fano v. Meachum* where he concludes that summary transfers are warranted:

> (A)dministrative realities may sometime necessitate the flexibility to transfer even on the basis of demonstrably inadequate information . . . . A forty percent risk that an inmate will disrupt or set a fire may in some circumstances be too great to take. (App. 153)

However, this dictum in the dissenting opinion overstates the issue in the present case, for the respondents do not question the adequacy of the information relied on by the petitioners, but instead, challenge the failure of the petitioners to provide the prisoners with adequate notice of this information or with *any* meaningful opportunity to be heard when charges of prior misconduct are being considered. The question of whether a prison official can act on "demonstrably inadequate information" should await a proper record before this Court.

Also, the discretion of prison officials is not unfettered. The touchstone of due process is the protection of the individual from the arbitrary action of government, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). Due process is a qualitative concept, not a quantitative one that depends on the percentage of error of a decision maker. Therefore, the quantum of information available to a prison official is not the relevant consideration; prison officials still retain the flexibility to act upon limited information as long as they "act fairly." *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974).

exercise of discretion." *Morrissey v. Brewer*, 408 U.S. 471, 483 (1972); *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973); *Robbins v. Kleindienst*, 383 F. Supp. 239, 246-247 (D.D.C. 1974). See also, E. Kimball and D. Newman, *Judicial Intervention in Correctional Decisions – Threat and Response*, 14 Crime and Delinquency 1, 9 (1968). Once factual matters are verified, erroneous information is corrected, and other relevant data is obtained from the inmate, there would be little room to challenge the considered, good faith exercise of discretion, unless the determination was arbitrary and capricious in the circumstances. Cf. *Ferrell v. Huffman*, 350 F. Supp. 164 (E.D. Va. 1972). Thus, the discretion of correctional officials would not be impinged upon by affording prisoners a hearing, and the opportunity for reliable and successful decisions would be more likely.

4. The Asserted Unsuitability of the Issues For Resolution

Petitioners (Pet. Br. at 25) and *amicus* [S. G. Montanye at 45, 46] assert that transfer decisions raise issues that are unsuitable for the provision of minimal due process protections since transfers may involve determinations of predictive behavior, the appropriateness or availability of rehabilitative programs or other administrative concerns. However, regardless of the validity of this contention in other circumstances, it lacks any substance in the present record since the respondents' hearings focused solely on allegations of past misconduct. Petitioners could hardly argue that these issues were unsuitable for determination at a hearing, for they conducted such hearings on these allegations in the instant case. Moreover, lower federal

court decisions since *Wolff* have repeatedly recognized the need for due process procedures, even when the transfers were not triggered by a specific act of misconduct, but were based on assessments of prior conduct. *Carlo v. Gunter*, 520 F.2d 1293 (1st Cir. 1975); *Robbins v. Kleindienst*, 383 F. Supp. 239 (D.D.C. 1974); *Catalano v. United States*, 383 F. Supp. 346 (D. Conn. 1974); *Clonce v. Richardson*, 379 F. Supp. 338 (W.D. Mo. 1974). These cases realistically conclude that nearly all prison decisions which have adverse consequences for the inmate, regardless of the purported purposes, involve determinations of past conduct where facts might be in dispute or in error.

Finally, as the *amicus* concedes, transfer hearing always involve factual issues [S.G. Br. 17]; therefore, a hearing would still be necessary for the appropriate resolution of the issues at hand. In the instant case, the controverted facts are obvious since the respondents were charged with allegations of prior misbehavior. In the other situations suggested by petitioners, past conduct may still be at issue and may form an important aspect of the transfer decision; therefore, the need for inmate involvement to resolve disputed facts, correct erroneous information or verify information in the file is no less compelling. The hearing would also provide the inmate with a brief opportunity to present reasons to the decisionmaker why he should not be transferred to a closer custody status and to call extenuating circumstances to the attention of the Board. Prison officials cannot plausibly claim to know so many facts about each inmate, that there is no

information that the inmate could possibly contribute that would influence a transfer decision.[79]

Consequently, the record before this Court fails to support any of the justifications suggested by petitioners for failing to afford the respondents the minimal requisites of due process.[80]

---

[79]In a few situations, such as overcrowding, where objective conditions or facts extrinsic to the inmate's prior conduct leave little room for question, a hearing may not be necessary as long as the inmate is afforded an adequate opportunity to respond to the transfer decision. Presumably, the inmate, if informed of the objective, non-arbitrary character of the decision, would waive his hearing. *Gomes v. Travisono*, 510 F.2d 527, 541 (1st Cir. 1975). If the prisoner is not afforded a hearing, however, the record should clearly demonstrate that his prior conduct did not play any role in the transfer decision. See *Rosenberg v. Preiser*, 388 F. Supp 639 (S.D. N.Y. 1975).

[80]Petitioners' argument that these hearings would be administratively burdensome is equally unpersuasive. First, the record in this case fails to support this assertion, for the petitioners did conduct hearings on the allegations of respondents' prior misconduct.

Second, available statistical evidence does not suggest that such hearings would impose a greater burden upon petitioners than disciplinary hearings. During 1973, the Federal Government alone conducted 19,000 misconduct hearings. *Wolff v. McDonnell*, 418 U.S. 539, 574 (1974). In the instant case the Solicitor General states that the number of medium to maximum security transfers only numbered about 1,200 in fiscal year 1975 (S.G. Br. at 3). There are no transfer figures for Massachusetts cited by the petitioners; however, it is safe to assume that the proportions are similar. Since procedural safeguards are offered in the area of prison discipline, which involves a substantially greater number of cases, the petitioners could hardly assert that it would be burdensome to provide transfer hearings.

B. The Hearings Provided The Prisoners Did Not Comply With The Minimal Requirements of the Due Process Clause.

1. Respondents Were Entitled To A Sufficiently Detailed Notice To Allow Them To Prepare Adequately for The Hearings.

In *Wolff v. McDonnell*, 418 U.S. 539 (1974), this Court held that the minimum requirements of procedural due process entitle a prisoner to "advance written notice of the claimed violation," 418 U.S. 539, 563 (1974). At a minimum, the notice must "inform [the inmate] of the charges and . . . enable him to marshal the facts and prepare a defense." *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974) [brackets supplied]: *Goldberg v. Kelly*, 397 U.S. 254, 267-268. Thus a primary function of this notice is "to clarify what the charges are, in fact." *Id.* at 564. Without sufficient notice, it is doubtful that the prisoner could "benefit from any hearing that was provided." Friendly, *Some Kind of Hearing*, 123 U. Penn. L. Rev. 1267, 1281 (1975). See also, *Morgan v. United States*, 304 U.S. 1, 3-4 (1938). In the present context, this notice should at least inform the inmate of the reasons why he may be transferred and apprise him of the underlying facts or adverse information which may be considered. See *Almanza v. Oliver*, 368 F. Supp. 981, 986 (E.D. Va. 1973); *Catalano v. United States*, 383 F. Supp. 346, 352 (D. Conn. 1974).

However, the notice to respondents in this case provided none of this vital information and failed to perform the requisite functions.[81] Rather than clarify

[81] The sufficiency of notice is challenged in this case, not the timing of the notice. The prisoners were notified several days in advance of the hearings and, in light of the serious allegations of misconduct, notice at that time was required.

the charges of serious misconduct, it obfuscated them. As the district court recognized, the notice did not even state the time and place of the alleged offense with reasonable accuracy (App. 137, 152). There was no indication of where the alleged violations had occurred, who had participated in them, when they had taken place, or what "instruments" had been possessed. Such notice certainly was insufficient to inform adequately the respondents of the charges against them and to enable them to prepare an appropriate defense.

The "hearings" demonstrate the utter inadequacy of the notices. Since respondents had no relevant information about the charges, the only plausible defense available to them was to make bald assertions that they were not involved in the alleged misconduct (App. 71, 75, 81-82, 94-95, 100, 105), or to introduce general information about their character or reputation (App. 70, 99, 105). The respondents were left to grope in the dark for some evidence, some statement that would convince the skeptical board of their position.[82]

Absent adequate notice, the pitfalls for the unwary or innocent are obvious: their denials of involvement in specific incidents can be interpreted as evidence of participation (App. 100). It is hardly surprising that the guilty individual may be in a better position in such circumstances because his knowledge of specifics might enable him to contrive a credible explanation for his conduct. In addition, inmates were unable to prepare necessary defenses to the allegations of misconduct. For example, Dussault and DeBrosky were charged with possessions of instruments or materials that might be used as "weapons" (App. 39, 40, 64). However, had the

[82] See Brief for Respondents, p. 4, note 6.

inmates known of the particular "instruments" or "materials" in question, they might have demonstrated that the "weapons" were used for institutional trades rather than for any illegal purposes (App. 70, 72, 94).

The hearings, for the most part, focused on irrelevant matters as the prisoners struggled to impress the Board with the reasons as the prisoners struggled to impress the Board with the reasons why they should stay at Norfolk.[83] However, the Board treated the information presented by the inmates as immaterial because the relevant inquiry had already been concluded by the time respondents and counsel were invited to reenter the hearing room.[84] The hearing was, therefore, an exercise in futility for the inmate whose feeble efforts underscored the functional inadequacy of the notice. See also, *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959); *Sostre v. McGinnis*, 442 F.2d 178, 198 (2nd Cir. 1971). The procedures so proudly touted by the petitioners [Pet. Br. at 6-7] only provided formal, ritualistic trappings for a "secret one-sided determination of facts decisive of rights." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170 (1951) (Frankfurter, J. concurring). See also *Morgan v. United States* 304 U.S. 1 (1938).

[83]See Brief for Respondents, p. 4, note 6.

[84]In at least one case, the inmate, upon entering the room, was informed by the Board that it had already concluded that the informant information was reliable before affording the prisoner any opportunity to be heard (App. 59).

2. The Respondents Were Entitled In The Particular Circumstances Of The Present Case To A Summary Of The Informant Information To Ensure A Meaningful Opportunity To Be Heard Prior To Their Transfers.

Petitioners assert that they were not constitutionally required to provide the respondents with a summary of the *in camera* informant information which formed the basis of the board's decisions because its disclosure "would . . . seriously compromise the physical safety of the informants." (Pet. Br. at 30). Petitioners' contention reflects a misunderstanding of the limited scope of the Court of Appeals' decision which merely applied traditional notions of due process to the actions of prison officials.

Contrary to the broad assertions of the petitioners, the requirement of a summary of informant information in the specific circumstances of this case adds nothing to what is already required by *Wolff*. As the Court of Appeals stated, one of the minimal requirements in a prison hearing is a "written statement as to the evidence relied on and the reasons for the disciplinary action" (App. 150). In view of this requirement, the limited issue raised by the instant record is whether there is any constitutional difference between providing the inmate, subsequent to the hearing, with a statement of the evidence relied on to support the allegation of misconduct and supply the identical information to the prisoner at the hearing.

Petitioners have not suggested, however, that such a constitutional distinction could be maintained nor can they point to anything in the record that would justify such a finespun analysis. Instead, petitioners assert a blanket right to refuse to provide a summary of the informant information. Since petitioners' position im-

pinges directly on the fundamental rights to a written statement and to a meaningful opportunity to be heard, it must be carefully analyzed. The Court of Appeals recognized that the present case only involved a limited inquiry because Institutional Order 4310.1, which is the product of correctional expertise in Massachusetts, provides a source of guidance for the appropriate procedures to be followed by prison officials in these circumstances (App. 151). This order requires that a summary of informant information be supplied to inmates in internal prison proceedings where allegations of major misconduct are at stake and where serious sanctions, including transfers, may be imposed (App. 117).[85]

Thus, state prison officials in Massachusetts have established a standard of due process governing the present circumstances and have already determined that the provision of a summary of informant information is

[85]This order represents a balance between the need for informant information in the prison context and the realistic recognition of the unreliability of this information. Numerous commentators have concluded that prison informants are unreliable, for self-interest, revenge or other venal motives may generate their information. Therefore, they are prone to fabrications, inaccuracies, or exaggerations. G. Sykes, *The Society of Captives*, 87-89 (Princeton University Press); McCorkle and Korn, "Resocialization Within Walls", Annals of American Academy of Political and Social Science, 293: 88-89 (May, 1954); Wilmer, *The Role of The "Rat" In The Prison*, 29 Fed. Probation 44-45 (March, 1965). The fact that I.O. 4310.1 was in effect at Walpole at the time of respondents' hearings cannot shield petitioners from their constitutional obligations, for petitioner Hall, the Commissioner of Correction, is charged with notice of its contents and with ensuring that the Constitution is not ignored in state prisons (App. 136).

not unduly burdensome or unworkable in the prison context. See *Wolff v. McDonnell*, 418 U.S. 539, 569 (1974); *Palmigiano v. Baxter*, 487 F.2d 1280, 1286 (1973). Therefore, the only consideration in the present set of circumstances was whether petitioners were able to justify their failure to provide similar protections to inmates at Norfolk.[86] However, petitioners were unable to point to any evidence in the record to justify such a failure. The district court and Court of Appeals gave short shrift to the vague notions of "prison security" postulated by petitioners, for these arguments are significantly undercut by the fact that the procedures were being followed at Walpole. If petitioners could have supplied some other reason unique to the security of Norfolk, a medium security prison, which would have justified more stringent procedures for the use of informant information than those followed at maximum security prisons, they certainly would have done so. The Court of Appeals, therefore, recognized that, in the present case, petitioners could not provide any justification for the substantial encroachments on the minimal procedures guaranteed by *Wolff* (App. 151-52).

Petitioners contend, however, that *Wolff* sanctions their failure to provide a summary of the informant information and rely upon the dictum of the Court that there "may be . . . occasions when personal or institutional safety are *so* implicated, that the statement [of evidence and reasons] may properly exclude *certain* items of evidence." *Wolff v. McDonnell*, 418 U.S. 539, 565 (1975) (emphasis supplied). Besides ignoring the thrust of the Court of Appeals' decision, the petitioners misconstrue the import of this Court's language. The

[86]See note 9, *supra*.

limited exception articulated in *Wolff*, which *may* permit the exclusion of *particular* items of evidence, does not mean that *all* items in the statement may properly be eliminated, nor does it permit the petitioners to transform the opportunity to be heard into a hollow ritual. Cf. *Gonzalez v. United States*, 304 U.S. 1 (1938). See also, Friendly, *Some Kind of Hearing*, 123 U. Penn. L. Rev. 1267, 1283 (1975). The discretion of prison officials in these circumstances has been sharply circumscribed, since the "written statement" is necessary to meet "the minimum requirements of procedural due process," *Wolff v. McDonnell*, 418 U.S. 539, 563 (1974). Their discretion is even more limited in the present circumstances because the petitioners have already promulgated a regulation which provides for the release of a summary of informant information.

The Court of Appeals appropriately realized that, in light of these limitations on the discretion of prison officials in Massachusetts, petitioners' could not merely assert, without justification, that none of the information could have been supplied to the respondents at their hearings. Moreover, the petitioners did not demonstrate on the record how "personal safety" or "institutional safety" would have been implicated by the release of something less than the entire summary which, at the very least, would have apprised the inmate of the time, place and nature of the charges. Thus, the Court of Appeals was eminently correct in its recognition that the failure of the petitioners to release the summary of the allegations of misconduct was not only fundamentally unfair but also permitted a limited exception to swallow up the constitutional rule.

CONCLUSION

The respondents' transfers to substantially more adverse conditions of confinement on the basis of allegations of misconduct resulted in significant changes in their freedom of movement and substantially limited their involvement in important rehabilitative programs. The notation in their files only exacerbated these immediate deprivations and affixed a permanent stigma on their reputations within the prison community. Furthermore, respondents had a legitimate claim of entitlement to the various rights, benefits and opportunities associated with incarceration at Norfolk, a medium security institution, and their transfer to maximum security prisons impinged on this fundamental property interest. Finally, as respondents have argued, the application of the Due Process Clause to the transfer of respondents to more adverse conditions of confinement on the basis of allegations of misconduct would prevent the swift demise of the constitutional rights so recently recognized in *Wolff*. Any of these factors, standing alone, should compel the application of the Due Process Clause to respondents' transfers. When combined, they highlight the overwhelming reasons for ensuring that a prisoner who is transferred to more adverse conditions of confinement on the basis of misbehavior is afforded the protections of the Due Process Clause.

The determination of what process is due in the present circumstances involves a balancing of the interests of the inmate in avoiding a summary transfer and of the interests of correctional officials in the pursuit of legitimate correctional goals. In the instant case, this inquiry is not very broad, for the interests asserted by the petitioners have either been accom-

modated by the balance struck in *Wolff* or lack any evidentiary support in the record before this Court. Therefore, those minimal due process procedures which are afforded in prison disciplinary hearings to ensure reliable and accurate adjudications of allegations of misconduct should be required. Respondents do not seek a trial-type proceeding; they merely contend that adequate notice, a meaningful opportunity to be heard and a written statement of the evidence relied on in reaching the decision is fundamentally fair in the present circumstances.

The petitioners, however, seek complete immunity from these procedural requirements, despite the fact that respondents' hearings involved determinations of allegations of past misconduct. The devastating implications of the petitioners' position are clearly illustrated by the present record. The petitioners rely on *Wolff v. McDonnell*, a decision that articulated the minimal requirements of due process in internal prison hearings, to justify notices that did not even apprise the inmates of the time and place of the alleged misconduct, hearings that did not provide the inmate with any opportunity to rebut the charges of misbehavior, and written statements that do not contain any reference to the evidence relied upon. The discretion afforded prison officials does not permit them to redraw so cavalierly the iron curtain between the prisons of this country and our Constitution.

For all of the reasons mentioned in the Brief, the respondents submit that the judgment of the Court of Appeals for the First Circuit should be affirmed.

Respectfully Submitted:

RICHARD SHAPIRO
Prisoners' Rights Project
294 Washington Street
Room 638
Boston, Massachusetts 02108

ANNE HOFFMAN
Prisoners' Rights Project
294 Washington Street
Room 638
Boston, Massachusetts 02108

(617) 482-2773

APPENDIX

STATUTORY REFERENCES
MASSACHUSETTS GENERAL LAWS ANNOTATED

CHAPTER 124

§ 1. *Power and Duties of Commissioner*

In addition to exercising the powers and performing the duties which are otherwise given him by law, the commissioner of correction, in this chapter called the commissioner, shall:

* * *

(e) establish, maintain and administer programs of rehabilitation, including but not limited to education, training and employment, of persons committed to the custody of the department, designed as far as practicable to prepare and assist each such person to assume the responsibilities and exercise the rights of a citizen of the commonwealth;

(f) establish a system of classification of persons committed to the custody of the department for the purpose of developing a rehabilitation program for each such person;

CHAPTER 127

§ 32. *Treatment of Prisoners*

The superintendents of the institutions under the supervision of the department of correction shall treat the prisoners with the kindness which their obedience, industry and good conduct merit.

§ 40. *Confinement to Isolation Unit in Correctional Institutions*

For the enforcement of discipline, an inmate in any correctional institution of the commonwealth may, at the discretion of its superintendent, be confined, for a period not to exceed fifteen days for any one offence, to an isolation unit.

Such isolation units must provide light, ventilation and adequate sanitary facilities, may contain a minimum of furniture, and shall provide at least one full meal daily.

§ 48. *Establishment and Maintenance; Rules and Regulations*

The commissioner shall establish and maintain education, training and employment programs for persons committed to the custody of the department. The administrators of county correctional facilities shall establish and maintain such programs for persons committed to such facilities. Such programs shall include opportunities for academic education, vocational education, vocational training, other related prevocational programs and employment, and may be made available within correctional facilities or, subject to the restrictions set forth in sections forty-nine and eighty-six F, at other places approved by the commissioner or administrator. In determining which employment programs to establish and maintain under the authority of this section, the commissioner or administrator shall take into account, first, the training value of the program, second, the job market and employment conditions in the community and third, in the case of programs to be carried out within a

correctional facility, the types of goods and services required by the commonwealth and its subdivisions.

The commissioner shall make and promulgate rules and regulations governing programs established under this section which shall include provisions for hours, conditions of employment, wage rates for employment program participants, incentive payments for education and training program participants, and deductions from said wages pursuant to the provisions of section eighty-six F.

§ 49. *Participation of Inmates in Programs Outside Correctional Facilities; Eligibility; Sentence Credit; Rules and Regulations; Escape, Punishment; Public Employment; Labor Dispute Restriction*

The commissioner of correction, subject to rules and regulations established in accordance with the provisions of this section, may permit an inmate who has served such a portion of his sentence or sentences that he would be eligible for parole within eighteen months to participate in education, training, or employment programs established under section forty-eight outside a correctional facility; provided that no committed offender is serving a life sentence or a sentence in a state correctional facility for violation of section thirteen, thirteen B, fourteen, fifteen, fifteen A, fifteen B, sixteen, seventeen, eighteen, eighteen A, nineteen, twenty, twenty-one, twenty-two, twenty-two A, twenty-three, twenty-four, twenty-four B, twenty-five, or twenty-six of chapter two hundred and sixty-five, or section seventeen, thirty-four, thirty-five, or thirty-five A, of chapter two hundred and seventy-two, or for an attempt to commit any crime referred to in said

sections shall be eligible to participate in education, training or employment programs outside a correctional facility, as established under section forty-eight, except on the recommendation of the superintendent on behalf of a particular committed offender and upon the approval of the commissioner.

In the case of a committed offender who participates in any program outside a correctional facility established under section forty-eight, the time spent in such participation shall be credited toward the serving of his sentence in the same manner as though he had served such time within the facility. A committed offender enrolled in any such program shall remain subject to the rules and regulations of the correctional facility and shall be under the direction, control and supervision of the officers thereof during the period of his participation in the program. The commissioner shall make and promulgate rules and regulations regarding programs established under section forty-eight outside correctional facilities. Such rules and regulations shall include provisions for reasonable periods of confinement to particular correctional facilities before a committed offender may be permitted to participate in such programs and provisions for feeding, housing and supervising participants in such programs in such manner as will be calculated to maintain morale and prevent the introduction of contraband to the facility.

If any inmate who participates in any program outside a correctional facility established under the provisions of section forty-eight leaves his place of employment, or having been ordered by the commissioner to return to the correctional facility, neglects or refuses to do so, said inmate shall be held to have escaped from said prison or institution and shall, upon

conviction of such escape, be sentenced to a state correctional facility for a term of not less than three years and not more than five years, and all deductions from the sentence or sentences he was serving at the time of such escape, authorized by section one hundred and twenty-nine, shall be forfeited, but said inmate shall be entitled to a deduction of sentence on any sentence imposed for said escape.

Committed offenders who are gainfully employed outside a correctional facility may be so employed by an agency of the commonwealth other than the department of correction or by public or private employers. The rates of pay and other conditions of employment for a committed offender so employed shall be the same as those paid or required in the locality in which the work is performed provided that no committed offender employed by an agency of the commonwealth shall be subject to sections nine A or nine B of chapter thirty, or chapter thirty-one, and in no case shall such rates of pay be less than those paid by his employer to other employees doing similar work. No committed offender shall be so employed at a place where there exists any strike or work stoppage arising from a labor dispute of any kind.

§ 49A. *Evaluation of Inmates for Participation in Programs Outside Correctional Facilities; Committees; Recommendation*

Before any inmate may be considered for participation in education, training, or employment programs established under section forty-eight outside a correctional facility, or in any other program outside a correctional facility, or in any other program outside a correctional facility exclusive of parole, he shall first

demonstrate that he is responsible and deserving of these opportunities.

The commissioner shall establish, in each state correctional facility, one or more committees made up of representatives from all segments of department of corrections staff, especially correction officers. Said committees shall take the form of teams of five correctional staff members, appointed by the superintendent of the correctional facility, at least two of whom shall be correction officers.

Said committees shall evaluate the behavior and conduct of inmates within the prison. In evaluating an inmate's behavior and conduct within the prison, said committee shall interview the inmate, and shall have access to disciplinary reports and other appropriate records. After evaluating the inmate's behavior and conduct within the prison, said committee shall make a recommendation to the superintendent of the correctional facility as to whether or not the inmate shall be permitted to participate in any program outside a correctional facility, exclusive of parole. Said recommendation shall be made in writing, and shall include the vote of said committee in making said recommendation.

§ 97. *Transfers from and to Correctional Institutions; Approval*

The commissioner may transfer any sentenced prisoner from one correctional institution of the commonwealth to another, and with the approval of the sheriff of the county from any such institution except a prisoner serving a life sentence to any jail or house of correction, or a sentenced prisoner from any jail or house of correction to any such institution

except the state prison, or from any jail or house of correction to any other jail or house of correction. Prisoners so removed shall be subject to the terms of their original sentences and to the provisions of law governing parole from the correctional institutions of the commonwealth.

§ 129D. *Work, Educational, Vocational Training and Rehabilitation Programs; Deduction of Sentence for Good Conduct*

For the satisfactory conduct of a prisoner while confined at a correctional institution of the commonwealth, but working at a state hospital or state school, satisfactory completion of an educational program leading to the award of a high school equivalency certificate, satisfactory performance of said prisoner in completion of any other educational sequence or any vocational training program established within or without the institution, satisfactory performance of said inmate over a period of six months when he or she is employed on work-release or in a prison industry, or satisfactory performance of siad inmates in any other program or activity which the superintendent of the institution shall deem valuable to said prisoner's rehabilitation, the commissioner may grant, in addition to the deductions of sentence provided under sections one hundred and twenty-nine and one hundred and twenty-nine C a further deduction of sentence of not more than two and one-half days for each month while said prisoner is working in a state hospital or school, on work-release or working in a prison industry, or partaking in any of the said programs or activities as aforesaid. Such further deduction of sentence under

said sections one hundred and twenty-nine and one hundred and twenty-nine C for reducing the term of imprisonment by deduction from the maximum term for which he may be held under his sentence or sentences, and for reducing from the minimum term of the sentence or sentences the good conduct credits earned under this section for parole eligibility as provided under section one hundred and thirty-three.

A prisoner whose term of imprisonment is reduced from the maximum term for which he may be held under his sentence or sentences shall receive from the commissioner a certificate of discharge on the date which has been determined by such additional deductions from the maximum term of his sentence or sentences.